92-1412

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

SHARON JOHNSON,

*Petitioner,*

v.

SHIRLEY BURTON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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February 25, 1993

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## QUESTION PRESENTED

Does a federal judge possess the power to discharge permanently a successful habeas corpus petitioner under 28 U.S.C. Section 2243 and forever bar the state from retrying her? If so, what standards govern the exercise of that power?

## LIST OF PARTIES

The parties to Ms. Burton's second petition for writ of habeas corpus included Petitioner and in addition, Thomas Rutledge, District Attorney, Fifth Judicial District, Carlsbad, N.M., Vernon Henning, Assistant District Attorney, Fifth Judicial District, Roswell, N.M., Attorney General of the State of New Mexico and the State of New Mexico.

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## OPINIONS AND JUDGMENTS BELOW

The district court's Final Order and Writ of Habeas Corpus, on remand from the Tenth Circuit Court of Appeals, forever setting aside the conviction, expunging Ms. Burton's record, and barring retrial by the state was filed November 23, 1992 and is reproduced in Appendix A.

The opinion of the Tenth Circuit Court of Appeals remanding the case to the district court for interpretation of its order conditionally granting the writ was entered

on September 11, 1992. It is reproduced in Appendix B. *Burton v. Johnson*, 975 F.2d 690 (10th Cir. 1992).

The order of the district court denying Ms. Burton's Motion for Issuance of a Final Writ of Habeas Corpus and ordering her to submit herself to state court for retrial was entered December 18, 1991. It is reproduced in Appendix C.

The opinion of the Tenth Circuit Court of Appeals affirming the district court's conditional grant of the writ and new trial was entered November 1, 1991. It is reproduced in Appendix D. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

The order of the district court conditionally granting the writ was entered December 27, 1989. It is reproduced in Appendix E.

## JURISDICTIONAL STATEMENT

This case arises from an application for writ of habeas corpus filed under 28 U.S.C. Section 2254 by Shirley Burton, a New Mexico inmate convicted of first degree murder. The district court's order conditionally granting the writ was entered on December 27, 1989. (Appendix E). The district court released Ms. Burton from state custody on January 4, 1990.

The state filed its Notice of Appeal from the grant of the writ on January 24, 1990. Ms. Burton filed her Notice of Cross-Appeal on January 29, 1990.

The Tenth Circuit filed its opinion from the state's appeal and Ms. Burton's cross-appeal November 1, 1991. (Appendix D).

The district court dismissed Ms. Burton's second petition for writ of habeas corpus and denied her Motion for Issuance of Final Writ of Habeas Corpus on December 18, 1991. (Appendix C). Ms. Burton filed her notice of appeal from these orders on that same date.

The Tenth Circuit Court of Appeals entered its opinion on Ms. Burton's second appeal September 11, 1992. (Appendix B). The State of New Mexico's Petition for Rehearing and Suggestion for Rehearing En Banc, filed on September 24, 1992 was denied by the Court of Appeals on October 28, 1992. (Appendix F). The district court entered its Final Order vacating Ms. Burton's conviction, expunging her record and barring the state from retrying her on November 23, 1992. (Appendix A).

This Court granted the state an extension of time within which to file its petition for certiorari up to and including February 27, 1993 by Order entered January 26, 1993. (Appendix G).

The jurisdiction of this Court to review the judgment of the Tenth Circuit which resulted in the district court's Final Order is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

The Tenth Circuit Court of Appeals rested its decision on a part of 28 U.S.C. Section 2243. The section relied upon provides: "The court shall summarily hear and

determine the facts, and dispose of the matter as law and justice require."

## STATEMENT OF THE CASE

Shirley Burton shot and killed her husband, Robert Burton, in Roswell, New Mexico on August 14, 1983. (App. 19). Ms. Burton presented evidence at trial that she suffered from "battered woman's syndrome." *Id.* The state presented evidence that Ms. Burton's husband did not abuse his wife or family. *Id.* The state also introduced evidence that Ms. Burton carefully planned the murder well in advance of the shooting and thus did not act in defense of herself and her children. *Id.* The jury convicted Shirley Burton of first degree murder. She received a sentence of life imprisonment. *Id.*

Ms. Burton had served approximately six years of the state's minimum life sentence of thirty-years when the federal district court entered a conditional grant of the writ on December 27, 1989. That order provided in material part:

> IT IS HEREBY ORDERED that the proposed amended findings and recommended disposition of the United States Magistrate are adopted by the Court.
>
> IT IS FURTHER ORDERED that the Petition be, and it hereby is, granted.
>
> IT IS ALSO FURTHER ORDERED that the Petitioner be released unless a new trial is commenced within 90 days.

(App. 49-50).

The state complied with the conditional order by acceding to Ms. Burton's release from its custody eight days later on January 4, 1990. The state did attempt to rearrest and retry Ms. Burton following her release. The district court held the state's efforts to be unlawful and the state withdrew its warrant. (App. 6). Ms. Burton attested in her motion for release that "the State of New Mexico will not be irreparably injured in the absence of a stay. . . . " (R.P. in Burton I, Doc. 49, p.2 #4(b)). The district court later summarily denied the state's request for a stay of its order.

The state determined to pursue its right to appeal.

The Tenth Circuit affirmed the district court's grant of the writ. (App. 40). The court found that a juror's silence during voir dire about her husband's abuse of members of the juror's family "deprived Mrs. Burton of her right to a fair trial by an impartial jury, and that she is entitled to a new trial." *Id.* The court mandated that "The judgment of the district court requiring a new trial is AFFIRMED." *Id.*

Following the entry of the Tenth Circuit's mandate Ms. Burton claimed, for the first time, that she was entitled to have the underlying state criminal case dismissed with prejudice and to have the state forever barred from retrying her for the murder of her husband. The essence of her claim was that the state did not comply with the alternative condition set forth by the district court's writ. She complained that the state failed to retry her within 90 days from December 27, 1989, the date of entry of the district court's initial conditional grant of the writ. Ms. Burton filed a second petition for writ of habeas corpus

advancing this claim. At the same time she filed a Motion For Entry of Final Writ of Habeas Corpus in her original habeas corpus proceeding which had been affirmed by the Tenth Circuit. This motion likewise advanced the theory that the state should be barred from retrying her because it had not provided a new trial within 90 days of December 27, 1989.

On December 18, 1991, the district court heard both the motion and Ms. Burton's request for a preliminary injunction based on the claims advanced in her second habeas corpus petition. The district court dismissed the second petition; it denied Ms. Burton's request for a preliminary injunction barring retrial of her by the state. (App. 16-17 relying on *Irvin v. Dowd*, 366 U.S. 717 (1961) and circuit cases in accord). The district court also ordered that Ms. Burton submit herself to the state district court so that it might set bond on the underlying state criminal charge and denied her motion for a final order barring retrial. (App. 14-15).

Ms. Burton appealed from the court's denial of her motion and dismissal of her second petition for writ of habeas corpus.

On this second appeal the Tenth Circuit held that a federal district judge has the authority to "permanently discharge a successful petitioner in a habeas corpus case where it deems such a remedy appropriate." (App. 10). The state had no notice until after the conclusion of the state's first appeal that the habeas petitioner in this case intended to claim her retrial was barred. Nonetheless the Tenth Circuit in the second appeal held, "[a]t this late date . . . the state is precluded from obtaining substantive

review of whether permanent discharge in the case at hand constitutes an abuse of the District Court's discretion." (App. 11).[1]

The district court's original grant of the writ failed to provide any notice to the state of the possibility of Ms. Burton's claim. That order clearly stated that the state was obligated to release the petitioner from its custody "unless" the state retried Ms. Burton within 90 days of December 29, 1989. The state acceded to petitioner's release. No reason existed to suspect it must also provide her a new trial pending the state's appeal.

The Tenth Circuit, however, found the district court's conditional order ambiguous. Thus it concluded that the district court in Ms. Burton's case might "invoke Rule 60(a) to resolve an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented." (App. 12). The circuit court of appeals denied the state's petition for rehearing on October 28, 1992. (App. 52).

The district court, on remand from the Tenth Circuit's second opinion in this case, interpreted its original grant of the writ "that the Petitioner be released unless a new

---

[1] Ms. Burton claimed the ninety day period expired March 27, 1990. Ms. Burton filed her brief on cross-appeal with the Tenth Circuit on October 4, 1990. Thus Ms. Burton possessed the knowledge and time to raise the issue of a retrial bar during the course of the state's original appeal. She alerted neither the district court nor the circuit court at the time the issue initially arose. The state argued, on Ms. Burton's second appeal, that she ought to have been precluded from raising her claim at this later date. *See, Hopkinson v. Schillinger*, 866 F.2d 1185, 1217 (10th Cir. 1989).

trial is commenced within 90 days" in the following manner:

> At the time of entry of that order, this Court intended that the state be afforded 90 days in which to commence a retrial of petitioner, and that if the state did not commence the retrial within that 90 day period, then the state would be permanently barred from ever retrying petitioner.

(App. 2).

The district court found that no trial was held within the 90 days after December 27, 1989 during the pendency of the state's appeal. (App. 2). For this reason alone the district court ordered that petitioner Burton's "conviction in *State of New Mexico v. Shirley Burton*, Chaves County No. Cr-84-24, be and hereby is vacated, set aside, and discharged for all purposes." (App. 3). The federal judge further directed that "the New Mexico District Court of Chaves County is ordered to vacate the judgment and sentence in *State of New Mexico v. Shirley Burton*, Chaves County No Cr-84-24, with prejudice and for all purposes, forever setting aside and discharging the conviction, thereby restoring all civil rights previously affected by that conviction and barring retrial on the charges underlying that indictment." (App. 3). The federal court also ordered the local district attorney and the Attorney General of the State of New Mexico to expunge Ms. Burton's record. (App. 3).

## REASONS FOR GRANTING THE WRIT

### I

### Summary of the Argument

The December 27, 1989 conditional order directed that Ms. Burton "be released *unless* a new trial is commenced within 90 days." (App. 50, emphasis added). The State of New Mexico complied with one of the alternatives set forth by the federal district court's conditional order: Ms. Burton was released from the state's custody eight days after entry of the court's conditional order. She has remained continuously free from January 4, 1990 to this day. The Tenth Circuit's opinion allowed the federal judge to permanently discharge Ms. Burton and forever bar her retrial by the state simply because the state did not comply with the other of the two alternatives set forth by the conditional writ. The state did not retry Ms. Burton within 90 days from the date the order was entered. Instead the state pursued its right to appeal.

When a state may be denied the right to enforce its own criminal laws by the imposition of a retrial bar on federal habeas corpus review without any significant legal justification, it is time for this Court to define standards which guide the exercise of a federal judge's discretion under Section 2243.

The Tenth Circuit determined that a federal judge may bar the retrial of a successful habeas corpus petitioner by a state as each individual judge may "deem appropriate" under Section 2243. This holding conflicts with legal limits established by other circuits that have permitted such extraordinary relief. Other circuits have allowed an absolute discharge in just two circumstances:

(1) the act of retrying the petitioner would itself violate the petitioner's rights under the Constitution of the United States and when (2) the State's conduct towards the petitioner or the federal court violated concepts of fundamental fairness and decency. The opinion below, by contrast, vests federal judges with essentially unbounded discretion to bar retrial by the states. Thus it departed from the established and equitable federal practice limiting remedies under Section 2243 on habeas corpus review.

## II

**The Tenth Circuit's Decision To Grant Unbounded Discretion To The District Court Under Section 2243 Exceeds Limits On Federal Habeas Corpus Remedies Established By Other Circuits.**

This Court needs to provide standards for federal judges which define the nature of remedies available to successful habeas corpus Petitioners in order to avoid subversion of the states' ability to enforce their criminal laws. The Court has communicated to federal courts throughout the Nation the general message that Section 2243 "does not limit the relief that may be granted to discharge of the [habeas] applicant from physical custody." *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968). However, past opinions of the Court have also acknowledged that the states traditionally possess the right to be given a reasonable time within which to retry a successful habeas corpus petitioner. *See, e.g., Herrera v. Collins*, 113 S.Ct. 853, 862 (1993) ("the District Court would presumably be *required* to grant a conditional order of relief, which would in effect require the state to retry petitioner . . . "

emphasis added.); *Fay v. Noia*, 372 U.S. 391, 440 n.45 (1963) (When a petitioner wins release from state custody "[i]t should be borne in mind that the typical order of the District Court in such circumstances is a conditional release, permitting the state to rearrest and retry the petitioner. . . . "); *Irvin v Dowd*, 366 U.S. 717, 728 (1961) (Under the predecessors of Section 2243 the Court "often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected.").

The express purpose for allowing the state to retry successful petitioners, like Ms. Burton, is to protect the doctrine of federal-state comity which is the foundation underlying federal review of state criminal convictions. *See, Coleman v. Thompson*, 111 S.Ct. 2546, 2555 (1991). The federal habeas corpus system, as it developed, constantly recognized "the independent power of a state to articulate societal norms through criminal law . . . " *McCleskey v. Zant*, 111 S.Ct. 1454, 1469 (1991). Thus the Court has continued to teach that "the power of a state to pass laws means little if the state cannot enforce them." *Id.*

The recent opinion of the Tenth Circuit and the district court's subsequent final order threatens the very fiber of this Court's comity doctrine as applied to federal habeas corpus review. Left to stand, the circuit's opinion could significantly disrupt the traditional federal practice of allowing the states to correct a constitutional violation by providing a new trial following the final grant of the writ. *Coleman v. Thompson*, 111 S.Ct. 2546, 2555 (1991) ("it would be unseemly in our dual system of government for a federal district court to upset a state court conviction

without an opportunity to the state courts to correct a constitutional violation").

Not only does the opinion below destroy traditional principles of comity in habeas corpus review by taking from the state the right to provide a constitutionally firm trial, but it also broadens the standard for granting absolute discharge under Section 2243. A survey of this Court's decisions, and decisions from other circuits, demonstrates that successful habeas petitioners have been granted an absolute discharge under Section 2243 for two general reasons: (1) The act of retrying the petitioner would violate the petitioner's rights under the Constitution of the United States; (2) The state's conduct violated concepts of fundamental fairness. *See, e.g., Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987); *Mizell v. Attorney General of the State of New York*, 586 F.2d 942 (2d Cir. 1978) (In both cases the circuit courts found retrial would constitute a constitutional violation); and *United States v. Vincent*, 524 F.2d 153 (2d Cir. 1975), *Edwards v. Louisiana*, 496 F.2d 904 (5th Cir. 1974) (In both cases the circuit courts found state misconduct justified discharge).

The Tenth Circuit's opinion in Ms. Burton's case ignored the established standards which have guided federal judges in authorizing an absolute discharge for a successful petitioner or imposing the sanction of a retrial bar on the state. The Tenth Circuit swept away these standards: "a district court, therefore, has authority to permanently discharge a successful petitioner in a habeas corpus case where it deems such a remedy appropriate." (App. 10). This standard, or lack thereof, far exceeds the boundaries for habeas corpus remedies established by the precedents of the circuits and the Court. *See infra* pp. 16-18.

The State of New Mexico did nothing to invite the ultimate punishment meted out in this case. The state acted appropriately and normally during the course of Ms. Burton's habeas proceeding and subsequent appeal. New Mexico's conduct during the course of Ms. Burton's federal habeas corpus review does not fall into that category of cases where a state has been punished, and not allowed to retry a successful petitioner, because it acted vindictively, in bad faith, or in intentional disregard of a federal court's mandate. The State of New Mexico acceded to Ms. Burton's release from its custody. The state did seek a stay in March of 1990 of the district court's grant of the conditional writ. The federal judge summarily denied the request. (App. 6).

The state timely appealed. Under the district court's order which gave the state two alternatives, the state had no reason to believe it had a legal obligation to retry Ms. Burton during this period. As a practical matter it would have been a waste of state resources to retry Ms. Burton during the pendency of the state's appeal. As a jurisprudential matter, retrying Ms. Burton during the period the state's case was being considered on appeal could have produced inconsistent results. If Ms. Burton had received inconsistent results on appeal and retrial it would have undermined the state's citizens' confidence in the constancy of its criminal justice system.

Though it made no sense to request a stay of an order which the state had complied with by securing Ms. Burton's release from custody – and though it made no sense to retry Ms. Burton pending the outcome of the state's appeal – the state was handed the ultimate punishment for its conduct. The Tenth Circuit determined that the

"ninety-day period for retrying Petitioner was not tolled during the appeal." (App. 6). It allowed the district court to exercise its discretion and decide whether it intended to permanently discharge Ms. Burton upon expiration of the original ninety-day period established by the conditional writ. (App. 12-13). With no further guidance, the federal judge on remand acquitted Ms. Burton by ordering her conviction for first degree murder "vacated, set aside and discharged for all purposes"; by "restoring all civil rights previously affected by that conviction"; and by "barring retrial on the charges underlying that indictment." (App. 3).

The Tenth Circuit did not find that the state acted vindictively, in bad faith, or with a "total callousness to ordinary decency due every human" which has in the past been the standard applied when a federal judge grants an absolute discharge. *United States v. Vincent*, 524 F.2d 153, 158 (2d Cir. 1975). Nor was there any finding that New Mexico's Attorney General departed from the general practice of the attorneys general of other states.

At no time during the pendency of Ms. Burton's habeas corpus proceedings has it been claimed by the district court, the circuit court, or Ms. Burton herself, that a retrial by the state would itself violate rights guaranteed her by the Constitution of the United States.

The state was denied the right to enforce its own criminal laws by the imposition of a retrial bar on federal habeas corpus review without any meaningful legal justification. This Court should use this opportunity to define the standards which bind a federal judge's discretion under Section 2243.

The Court has found it important in the past to define for the federal judges the nature and scope of the discretion vested in them. *Brown v. Allen*, 344 U.S. 443 (1953); *see also, McCleskey v. Zant*, 111 S.Ct. 1454, 1461 (1991). In *Brown v. Allen*, Justice Frankfurter set forth standards to govern federal judges when disposing of habeas applications from prisoners under the sentence of state courts. Justice Frankfurter explained the importance of setting standards for the exercise of a federal judge's discretion in a habeas corpus proceeding:

> The Nation's Supreme Court ought to be able to do better than to tell the Federal Judges of the land, in a field so vital as that of habeas corpus to vindicate constitutional rights, that they may do as they please – that they are not to be bound, nor to be guided, by considerations capable of rational formulation.

*Brown v. Allen*, 344 U.S. at 496-497.

Justice Frankfurter's opinion for the Court added that judicial discretion "must be subject to rational criteria, by which particular situations may be adjudged." *Id.* at 496. The Tenth Circuit's opinion in this case is devoid of rational criteria. Instead of guidance, the decision specifically grants federal judges the power to "do as they please," unbound by "considerations capable of rational formulation." *Id.* To abandon the opportunity to establish standards in the face of New Mexico's necessity would be to "invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' " *Id.* quoting *Cardoza, The Nature of the Judicial Process*, 139, 141 (1921).

The Tenth Circuit's holding that federal judges may permanently discharge convicted state prisoners, guided only by each judge's sense of appropriateness conflicts with the decisions of other circuit courts allowing the absolute discharge of a successful habeas corpus petitioner. This Court recently indicated in *Herrera* that under most circumstances a district judge is "required" to give a state an opportunity to retry a successful petitioner. *Herrera v. Collins*, 113 S.Ct. 853, 862 (1993).

The State of New Mexico maintains that the outcome in this case calls for the Court finally to express the standards that govern federal judges should they decide that "law and justice require" them to discharge a petitioner permanently under 28 U.S.C. Section 2243. A clear articulation of the standards established by the courts of other circuits, and ignored by the Tenth Circuit, will aid federal courts throughout the land in the effective administration of justice. A guide for the federal judges will prevent severe harm to the states – and allow them to continue to enforce the criminal laws of each state. The articulation of standards will leave the vitality of the great writ untouched and protect the interests of federalism embodied in habeas corpus review.

## III

**The Opinion Below Conflicts With The Limits Established By Other Circuits For Allowing An Absolute Discharge And Retrial Bar Under Section 2243.**

The Second, Third, Fifth and Eleventh Circuits have expressed the opinion that a successful habeas corpus petitioner may be absolutely discharged and a state may

be barred from retrying the petitioner on the underlying state criminal indictment if a state's conduct in the course of its custody and subsequent federal habeas corpus proceedings violated concepts of fundamental fairness. The Second, Third and Fifth Circuits have approved the harsher remedy of absolute discharge when a state failed to comply with *any* of the alternatives spelled out by a district court's conditional writ. *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) (State had not resentenced nor released petitioner two years after district court ruled petitioner's right to speedy trial would be violated if not resentenced within sixty days, petitioner unconditionally discharged from that conviction.); *United States v. Vincent*, 524 F.2d 153 (2d Cir. 1975) (State "egregiously violated the spirit of [the circuit court's] 1969 mandate" by failing to release petitioner or to provide a sanity hearing for petitioner three years after the state had been given sixty days to do so; the court concluded the state had committed "other inexcusable breaches of good faith and elementary decency" and absolutely discharged petitioner); *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975) (Federal parole commission failed to comply with any of the terms of district courts conditional writ; petitioner discharged from custody); *Edwards v. Louisiana*, 496 F.2d 904 (5th Cir. 1974) (State failed to comply with any of the terms of conditional writ and also failed to appeal; state failed to show any cause for its conduct beyond its own negligence; petitioner "discharged" from state custody); *Cf. Gardner v. Pitchess*, 731 F.2d 637 (9th Cir. 1984) (retrial bar not justified simply because state failed to comply with time limits set forth by conditional writ).

The Eleventh Circuit has recognized that a state's dilatory conduct during federal habeas corpus proceedings could influence a district court asked to impose a retrial bar. *Moore v. Zant*, 972 F.2d 318, 319 (11th Cir. 1992) (State of Georgia not barred from resentencing petitioner even through it was given 180 days to do so and waited, instead, twenty months before seeking to resentence; federal district court ordered on remand to determine "if it was still equitable to enforce the order"); *Ritter v. Smith*, 811 F.2d 1398, 1405 (11th Cir. 1987) (Circuit court determined state was not "dilatory" in its actions when it "simply declined to file a futile and unjustified motion for relief" and declined request to discharge petitioner).

Other federal courts have approved the imposition of a retrial bar upon a state if "the very act of re-trying petitioner would infringe upon his constitutional rights." *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) (speedy trial concerns implicated); *Mizell v. Attorney General of the State of New York*, 586 F.2d 942 (2d Cir. 1978) (retrial would constitute double jeopardy); *Silk-Nauni v. Fields*, 676 F. Supp. 1076 (W.D. Okla. 1987) (retrial on certain state criminal charges barred by double jeopardy); *Latzer v. Abrams*, 615 F. Supp. 1226, 1230 (E.D.N.Y. 1985) (retrial might be barred if it constituted a constitutional violation); *Palmer v. Judge and District Attorney General of Tennessee*, 411 F. Supp. 1029 (W.D. Tenn. 1976) (retrial would constitute a speedy trial violation under Sixth Amendment).

The Tenth Circuit decided to allow federal judges to impose the severe sanction of a retrial bar on the state as the bench "deems appropriate." This holding conflicts

with the decisions of other circuits which have approved such a drastic remedy only under the extraordinary circumstances of continued and intentional state misconduct or if retrial itself would constitute a violation of the Constitution. The State of New Mexico asks the Court to correct this conflict in a vital area of federal habeas corpus practice. The states' strong interest in enforcing their own criminal laws will be severely harmed absent a resolution of the conflict.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals. In the alternative, petitioner respectfully asks the Court to vacate the court of appeal's opinion and remand the cause for a new trial by the State of New Mexico on the underlying state criminal indictment.

Respectfully submitted,

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February 25, 1993

**APPENDIX A**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHIRLEY BURTON,

Petitioner

vs. Civil No. 87-0557-JC

SHARON JOHNSON,

Respondent.

---

SHIRLEY BURTON,

Petitioner,

vs. Civil No. 91-1184-JC

SHARON JOHN, THOMAS RUTLEDGE, District Attorney, Fifth Judicial District of New Mexico, Carlsbad, N.M.; VERNON HENNING, Assistant District Attorney, Fifth Judicial District of New Mexico, Roswell, N.M.; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; THE STATE OF NEW MEXICO,

Respondents.

FINAL ORDER AND WRIT OF HABEAS CORPUS

(Filed Nov. 23, 1992)

This matter comes before the Court on the issuance of the November 5, 1992, mandate and the September 11, 1992, opinion of the United States Court of Appeals for

the Tenth Circuit in *Shirley Burton v. Sharon Johnson,* Nos. 90-2016 and 90-2019, and *Shirley Burton v. Sharon Johnson, Thomas Rutledge, Vernon Henning, Attorney General of the State of New Mexico, and the State of New Mexico,* Nos. 91-2296 and 91-2297, in which opinion this Court was directed "to interpret, clarify and enforce its judgment" of December 27, 1989, in the above-captioned case.

In the above-captioned case on December 27, 1989, this Court entered an order which stated:

> IT IS FURTHER ORDERED that the petition be, and it hereby is, granted.
>
> IT IS ALSO FURTHER ORDERED that the Petitioner be released unless a new trial is commenced within 90 days.

At the time of entry of that order, this Court intended that the State be afforded 90 days in which to commence a retrial of petitioner, and that if the state did not commence the retrial within that 90 day period, then the state would be permanently barred from ever retrying petitioner.

Although the state trial court twice set the matter for retrial within the 90 days, the state prosecutor each time chose not to go forward with the prosecution, despite petitioner's readiness to proceed. Thus, no trial was held within the 90 days after December 27, 1989.

The state did not appeal the remedy, nor did the state appeal this court's denial of a stay of the 90-day period.

Therefore, for the reasons set forth in the Magistrate's Amended Proposed Findings of August 14, 1989, adopted by this Court on December 27, 1989, as modified by the opinion of the U.S. Court of Appeals in *Burton v.*

*Johnson*, 948 F.2d 1150 (10th Cir. 1991), this Writ of Habeas Cropus [sic] be, and hereby is issued, and petitioner Burton's conviction in *State of New Mexico v. Shirley Burton*, Chaves County No. CR-84-24, be and hereby is vacated, set aside, and discharged for all purposes.

Further, the New Mexico District Court of Chaves County is ordered to vacate the judgment and sentence in *State of New Mexico v. Shirley Burton*, Chaves County No CR-84-24, with prejudice and for all purposes, forever setting aside and discharging the conviction, thereby restoring all civil rights previously affected by that conviction and barring retrial on the charges underlying that indictment.

Respondents Rutledge and the Attorney General of the State of New Mexico are ordered to transmit to the National Crime Information computer system for entry in that system the notation that *State of New Mexico v. Shirley Burton*, Chaves County No. CR-84-24 has been vacated, and to provide a copy of that corrected entry in the National Crime Information computer to petitioner's counsel.

Petitioner is released from bond conditions previously set by this court and from any obligations imposed by this Court's orders of December 18, 1991.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

Submitted by
Tova Indritz
Attorney for Petitioner Burton

**APPENDIX B**

**PUBLISH**

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| | | |
|---|---|---|
| SHIRLEY BURTON,<br><br>Petitioner-Appellee and Cross-Appellant,<br><br>v.<br><br>SHARON JOHNSON,<br><br>Respondent-Appellant and Cross-Appellee. | ) | Nos. 90-2016<br>90-2019 |

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|---|---|---|
| SHIRLEY BURTON,<br><br>Petitioner-Appellant<br><br>v.<br><br>SHARON JOHNSON, THOMAS RUTLEDGE, District Attorney, Fifth Judicial District of New Mexico, Carlsbad, N.M.; VERNON HENNING, Assistant District Attorney, Fifth Judicial District of New Mexico, Roswell, N.M.; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; THE STATE OF NEW MEXICO,<br><br>Respondents-Appellees. | ) | Nos. 91-2296<br>91-2297<br>(Filed<br>Sept. 11, 1992) |

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. Nos. 87-0557JC and Civil 91-1184JC)

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Tova Indritz, Federal Public Defender, Albuquerque, New Mexico, for Petitioner-Appellee and Cross-Appellant in Nos. 90-2016, 90-2019; and for Petitioner-Appellant in Nos. 91-2296, 91-2297.

Mary Catherine McCulloch (Tom Udall, Attorney General, Hal Stratton, former Attorney General, and Charles Rennick, Assistant Attorney General, State of New Mexico, Santa Fe, New Mexico, on the briefs) for Respondent-Appellant and Cross-Appellee in Nos. 90-2016, 90-2019; and for Respondents-Appellees in Nos. 91-2296, 91-2297.

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Before McKAY, Chief Judge, ANDERSON, Circuit Judge, and BROWN,[1] Senior District Judge.

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McKAY, Chief Judge.

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These consolidated appeals stem from the remedy contained in the District Court's order granting Petitioner's request for a writ of habeas corpus. Petitioner, Shirley Burton, filed her habeas corpus petition in the United States District Court for the District of New Mexico in 1987 challenging her state court conviction on first-degree murder charges. The District Court granted the

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[1] Honorable Wesley E. Brown, United States Senior District Judge for the District of Kansas, sitting by designation.

petition in an order issued on December 27, 1989. That order stated:

> It IS FURTHER ORDERED that the Petition be, and it hereby is, granted.
>
> IT IS ALSO FURTHER ORDERED that the Petitioner be released unless a new trial is commenced within 90 days.

Both Petitioner and the state appealed the District Court's determination.

Petitioner was released from custody on January 4, 1990, shortly after the District Court's judgment was entered. State authorities immediately arrested her pursuant to a state court bench warrant on the underlying murder charge. The District Court then claimed exclusive jurisdiction over the conditions of Petitioner's release and held the arrest unlawful. The state subsequently withdrew the warrant.

In March of 1990, the state sought a stay of the District Court's order directing that a new trial be held in ninety days. The District Court summarily denied the state's stay application without explanation. The state did not appeal the District Court's denial or apply to this court for a stay. Thus, the ninety-day period for retrying Petitioner was not tolled during the appeal. The state set trial twice during the ninety-day period. Both settings were vacated at the state's request, however. Consequently, when the ninety-day retrial period expired on March 27, 1990, Petitioner had not been retried.

On November 1, 1991, this court filed an opinion affirming the District Court's grant of Petitioner's writ. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991). Our

mandate stated, "The judgment of the district court requiring a new trial is AFFIRMED." *Id.* at 1159. Neither party had raised on appeal the conditional nature of the order or the effect of the expiration of the ninety-day period. Thus, this court did not address these issues in its opinion. The state did not petition for a rehearing, and this court's mandate issued November 25, 1991.

On December 2, 1991, following our decision in *Burton v. Johnson* and the return of the mandate to the District Court, Petitioner filed in the District Court a Motion for the Issuance of a Writ of Habeas Corpus in the underlying habeas action. In that motion Petitioner asked for a final order granting the writ and barring Petitioner's retrial by the state. Petitioner contended that because the state failed to retry her within the ninety-day retrial period or obtain a stay of that period the state was barred forever from retrying her.

On December 4, 1991, the state asked Petitioner to surrender herself on December 9 for incarceration pending retrial. The federal magistrate conducted a telephone conference with counsel on December 5, 1991, and determined that the federal court did not have jurisdiction to prevent Petitioner's reincarceration after this court's issuance of the mandate.

Petitioner then commenced a second habeas action challenging the state's authority to retry her. In that action she also sought a temporary restraining order ("TRO") and a preliminary injunction preventing the state from incarcerating and retrying her. Following a hearing on December 6, 1991, the District Court granted the TRO until a hearing on the preliminary injunction

could be held. The District Court also asked counsel to brief the issues of whether the District Court had the jurisdiction and the authority to permanently discharge Petitioner pursuant to its December 27, 1989, order.

The District Court held a hearing on the preliminary injunction request on December 16, 1991. The District Court denied the preliminary injunction and the motion for a final writ in the underlying habeas case, dissolved the TRO and dismissed that second petition for writ of habeas corpus. Although the record is not crystal clear on this point, the District Court appeared to determine that it did not have the authority or the jurisdiction to permanently discharge Petitioner.

Petitioner then appealed from the denial of the post-judgment motion for a final writ in the underlying case and from the dismissal of the second habeas petition and denial of the preliminary injunction. Seeking to cover all jurisdictional bases, she simultaneously moved this court to recall its mandate in *Burton v. Johnson* and to issue an order requiring the District Court to enter an unconditional writ of habeas corpus barring her retrial by the state.

Petitioner further moved this court for an injunction barring her retrial pending our disposition of the appeals. We granted Petitioner's request for an injunction and ordered that the state be enjoined from arresting, incarcerating, or retrying Petitioner on the underlying murder charges until further order of this court. We also recalled our mandate pending disposition of these appeals.

As described above, Petitioner now appeals the District Court's denial of her requests for a retrial bar. The

threshold question before us is whether our mandate in *Burton v. Johnson* provided a remedy that superseded that provided in the District Court's initial order. The state interprets our language "[t]he judgment of the district court requiring a new trial is AFFIRMED" to be a specific direction that Petitioner be retried. The state contends that our mandate thereby divested the District Court of jurisdiction to bar Petitioner's retrial pursuant to its initial remedy.

When the parties filed notices of appeal challenging the District Court's judgment in the underlying case, the District Court was divested of jurisdiction over matters involved in the appeal. *See Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 825 (5th Cir. 1986). Once we affirmed the District Court on appeal and returned the mandate, however, the District Court reacquired jurisdiction over the case. *See id.* at 826. While our mandate in *Burton v. Johnson* controls on all matters within its scope, the District Court now has jurisdiction to pass upon any issues which are not expressly or impliedly within the scope of that mandate.

This court is vested with the authority to interpret its own mandate. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). In doing so, we conclude that the state's interpretation of our mandate in *Burton v. Johnson* is incorrect. Our mandate did not provide a superseding remedy in this case. Rather, our mandate affirmed the remedy accompanying the District Court's grant of Petitioner's writ. Thus, upon return of the mandate, the District Court reacquired jurisdiction to enforce the remedy set out in its original order. Furthermore, our mandate did not encompass the conditional nature of the

judgment or the effect of the expiration of the ninety-day period because those issues were not before us on appeal. Thus, our disposition does not prevent the District Court from interpreting, as well as enforcing, its initial judgment in this case.

We next address the state's contention that the District Court lacks the authority to permanently discharge Petitioner. The state claims that authorizing such a remedy would be an abuse of discretion in this case.

A federal court is vested with " 'the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus.*' " *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (citation omitted). In issuing a writ of habeas corpus, a federal court has the power and authority to dispose of habeas corpus matters "as law and justice require." 28 U.S.C. § 2243 (1988). The habeas corpus statute's "mandate is broad with respect to the relief that may be granted." *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968). As this circuit has recognized, a federal court "possesses power to grant *any form of relief necessary* to satisfy the requirement of justice." *Levy v. Dillon*, 415 F.2d 1263, 1265 (10th Cir. 1969) (emphasis added). A district court, therefore, has authority to permanently discharge a successful petitioner in a habeas corpus case where it deems such a remedy appropriate. *See Bromley v. Crisp*, 561 F.2d 1351, 1364 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). *See, e.g., Hammontree v. Phelps*, 605 F.2d 1371, 1381 (5th Cir. 1979) (petitioner permanently discharged pursuant to grant of writ); *Grasso v. Norton*, 520 F.2d 27, 38 (2d Cir. 1975) (same).

In exercising its broad habeas corpus authority, however, a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted. Indeed, this circuit has recognized that "holding a conviction invalid and granting the writ do not generally bar retrial on the original charge," *Bromley v. Crisp*, 561 F.2d at 1364.

At this late date, however, the state is precluded from obtaining substantive review of whether permanent discharge in the case at hand constitutes an abuse of the District Court's discretion. The District Court's conditional order ended the litigation and left nothing for the court to do but execute the judgment. That order was, therefore, an appealable final judgment. *See Blake v. Kemp*, 758 F.2d 523, 525 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985). Neither party appealed the issue and, thus, neither party may raise the issue here. The parties have waived any challenge to the remedy. Thus, the remedy will be enforced as it stands.

Unfortunately, the District Court's judgment is ambiguous as to the intended effect of the expiration of the ninety-day period. It is unclear what type of "release" the District Court intended in ordering that Petitioner "be released unless a new trial is commenced within 90 days." The state contends the District Court merely intended to authorize Petitioner's release until a trial eventually was held. Petitioner claims the District Court intended to permanently discharge Petitioner if the state failed to retry her within the ninety-day period. Although the subsequent actions of the District Court indicate an intent to permanently discharge Petitioner, the record is not clear enough for us to determine the intended scope

of the remedy.[2] Thus, we remand this case to the District Court for interpretation and clarification of the December 27, 1989, order pursuant to Rule (60)(a) of the Federal Rules of Civil Procedure.[3]

A District Court is not limited under Rule 60(a) to the correction of clerical mistakes arising from oversight or omission. Rather, a district court may also invoke Rule 60(a) to resolve an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented. *See Panama Processes, S.A. v. Cities Service Co.*, 789 F.2d 991, 993 (2d Cir. 1986); *McNickle v. Bankers Life and Cas. Co.*, 888 F.2d 678, 682 (10th Cir. 1989). A district court is not permitted, however, to clarify a judgment pursuant to Rule 60(a) to reflect a new and subsequent intent because it perceives its original judgment to be incorrect. *See Panama Processes,*

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[2] The transcript of the December 16, 1991, hearing fails to provide insight into the intent of the District Court's initial judgment. At that hearing, the District Court did not focus on the contemporaneous intent of its December 27, 1989, order in denying Petitioner a retrial bar. Rather, the District Court appeared to rely on case authority suggesting that ordering permanent discharge in a habeas corpus case such as this would constitute an abuse of discretion.

[3] The procedures set out in the habeas corpus statutes take precedence over the Federal Rules of Civil Procedure during the pendency of habeas corpus proceedings. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 267-68 (1978). The habeas corpus statutes do not prescribe post-judgment procedures, however, The statutes are silent about the proper method for obtaining the correction of asserted errors after judgment, whether on appeal or in the district court. *Id.* Thus, the post-judgment procedures prescribed in the Federal Rules of Civil Procedure apply to this habeas corpus case.

789 F.2d at 994-95. Rather, the interpretation must reflect the contemporaneous intent of the district court as evidenced by the record. *See Blankenship v. Royalty Holding Co.*, 202 F.2d 77, 79-81 (10th Cir. 1953). Thus, in determining whether it intended to permanently discharge Petitioner upon expiration of the ninety-day retrial period, the District Court may not resort to hindsight.

Petitioner's motion for probable cause in *Burton v. Johnson* is granted. Our mandate in *Burton v. Johnson* is reinstated. The Petition for Writ of Habeas Corpus in *Burton v. Rutledge* is dismissed. This case is remanded to the District Court. The District Court is directed to vacate the December 18, 1991, orders from which Petitioner appeals and to interpret, clarify and enforce its judgment in the underlying case.

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHIRLEY BURTON,

Petitioner,

vs. Civil No. 87-0557 JC

SHARON JOHNSON,

Respondent.

ORDER

(Filed Dec. 18, 1991)

This court heard petitioner's Motion for Issuance of a Final Writ of Habeas Corpus in the above captioned cause on December 16, 1991, and the court being fully advised of the facts and the law related to all of the issues raised by petitioner in her Motion hereby finds:

1. That Ms. Burton was released from State custody by this court on January 4, 1990, under its order granting petitioner's writ of habeas corpus which was entered December 27, 1989, in this cause;

2. That the Tenth Circuit Court of Appeals' mandate in *Burton v. Johnson*, No. Civ. 87-0557 JC affirmed the federal district court's grant of the writ of habeas corpus;

3. That State district court Judge Schnedar has scheduled a hearing to set bond in Ms. Burton's underlying state criminal charge on Thursday, January 9, 1992 at 2:30 p.m., in Roswell, New Mexico.

THEREFORE IT IS ORDERED that Petitioner's Motion is denied and that Petitioner submit herself to the

state district court in Roswell, New Mexico by Thursday, January 9, 1992 at 2:30 p.m.

Further it is ordered that Petitioner Burton be and hereby is relesed [sic] from the conditions of release set by this Court on January 4, 1990, as subsequently amended.

This Order is entered *nunc pro tunc* as of December 18, 1991.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHIRLEY BURTON,

Petitioner

vs. Civil No. 91-1184 JC

THOMAS RUTLEDGE, District Attorney, Fifth Judicial District of New Mexico, Carlsbad, N.M.; VERNON HENNING, Assistant District Attorney, Fifth Judicial District of New Mexico, Roswell, N.M.; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

## ORDER OF DISMISSAL

(Filed Dec. 18, 1991)

This petition comes before the court on hearing on petitioner's request that a preliminary injunction be entered; 1) barring the State of New Mexico from retrying petitioner on a charge of first degree murder following the filing of the mandate from the Tenth Circuit Court of Appeals on or around December 3, 1991 and/or 2) continuing federal custody of the petitioner until such time as the state did retry Ms. Burton. The hearing was held on December 16, 1991.

The court being fully apprised of the facts and the law related to both issues hereby FINDS:

1. That Ms. Burton was released from state custody by this court on January 4, 1990, under the district court order granting the petitioner's request for writ of habeas corpus in *Burton v. Johnson*, No. Civ. 87-0557 JC;

2. That the Tenth Circuit Court of Appeals' mandate in *Burton v. Johnson*, No. Civ. 87-0557 JC directed that the federal district court grant of the writ of habeas corpus was affirmed.

THEREFORE IT IS ORDERED that the request for preliminary injunction on the petitioner's request to bar retrial in state court in the above captioned cause is denied according to *Irvin v. Dowd*, 366 U.S. 717 (1961); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.) *cert. denied*, 479 U.S. 972 (1986); *Bromley v. Crisp*, 561 F.2d 1351, (10th Cir. 1977); that the request to continue federal custody until the state actually retries Ms. Burton is denied; *See U.S. ex rel. Thomas v. State of New Jersey*, 742 F.2d 735 (1973); and

that the petition for writ of habeas corpus in the above-captioned case is dismissed.

This order is entered *nunc pro tunc* 18, 1991.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

Approved as to form:
Mary Catherine McCulloch
Assistant Attorney General

Tova Indritz
Counsel for Shirley Burton

**APPENDIX D**

**PUBLISH**

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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|---|---|---|
| SHIRLEY BURTON,<br>Petitioner-Appellee,<br>Cross-Appellant,<br>v.<br>SHARON JOHNSON,<br>Respondent-Appellant,<br>Cross-Appellee. | ) | Nos. 90-2016<br>90-2019<br><br>(Filed Nov. 1, 1991) |

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 87-0557)

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Charles H. Rennick, Assistant Attorney General (Hal Stratton, Attorney General, with him on the brief), Santa Fe, New Mexico, for Respondent-Appellant.

Tova Indritz, Federal Public Defender, Albuquerque, New Mexico, for Petitioner-Appellee and Cross Appellant.

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Before McKAY, Chief Judge, ANDERSON, Circuit Judge, and BROWN, Senior District Judge.

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BROWN, Senior District Judge.*

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Appellant Sharon Johnson, Warden for the State of New Mexico, appeals the order of the United States District Court for the District of New Mexico, granting Shirley Burton's petition for a writ of habeas corpus. Mrs. Burton cross-appeals from the order insofar as it denied some of the claims for relief contained in her federal petition.

Shirley Burton admitted that in the early hours of August 14, 1983, she shot and killed her husband, Robert Burton, in Roswell, New Mexico. She claimed that she did so because she believed from his past actions that she and her children were in immediate danger of great bodily harm, sexual abuse and death at the hands of her husband. She presented evidence of Robert's repeated physical, sexual and verbal assaults upon her and her two children, together with evidence that she suffered from "battered woman's syndrome," which contributed to her belief that she had to kill her husband in order to protect her children and herself from continued abuse. The state introduced evidence that Robert did not abuse his family, and that Mrs. Burton, having carefully planned the murder in advance, did not act in defense of herself and children. The jury convicted Mrs. Burton of murder in the first degree, and she was sentenced to life imprisonment.[1]

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* Honorable Wesley E. Brown, United States Senior District Judge, District of Kansas, sitting by designation.

[1] Prior to trial, Mrs. Burton was offered a 7 year sentence in return for a plea of murder in the second degree. She declined

The issues presented in this appeal concern the manner in which the state trial court conducted the *voir dire* of the jury panel, and the discovery after trial that one of the jurors who served on the case was the victim of mental and physical abuse by her husband, and that this juror's children had also been abused by their father. Other issues involve the propriety of instructions and the claim that alleged cumulative error denied Mrs. Burton's right to fair trial.

The federal district court adopted the findings of the magistrate and found that Mrs. Burton's right to an impartial jury had been denied because a woman who served on the jury had suffered abuse in her own family. In addition, the court found that inadequate *voir dire* proceedings denied Mrs. Burton's right to an impartial jury and fair trial. The state elected not to retry Mrs. Burton within the 90 days allotted by the federal district court, she was released from custody, and is free pending this appeal.

The circumstances of the *voir dire* and other state court proceedings relating to Mrs. Burton's trial and conviction may be described as follows:

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this offer and proceeded to trial. See Exhibits to Item 49, Volume II Record, U.S. District Court.

On this appeal, there are two volumes of records from the District Court of Chaves County, New Mexico and the New Mexico Supreme Court, and 121 audiotapes of trial proceedings in Chaves County. In addition, there are two volumes of records arising from the federal habeas corpus proceedings in the District Court for the District of New Mexico.

These records will be referred to hereafter as "state records" or "federal records".

Because of the nature of her defense, Mrs. Burton's counsel filed a pretrial motion for individual, sequestered questioning of the jury panel on subjects pertaining to physical, emotional and sexual abuse of wives and children.[2] Attached to this motion was an affidavit of an expert in group dynamics and the jury selection process which related to the hesitancy of people to speak about sensitive subjects when others are present. It was the opinion of this expert that "(i)n a trial with inflammatory issues and one in which potentially many of the members of the venire have attitudes or prejudices that could be hidden during the *voir dire*, the only possibility of obtaining a fair trial would be through extensive, open-ended, attorney-conducted, sequestered *voir dire*." Vol I, State Record, Page 100, Affidavit of Bennett.

At a hearing on this motion, the defense presented expert testimony to the effect that in the area of sensitive topics, members of the venire tend to make socially acceptable statements, and that in order to inquire into such topics as sexual abuse and wife beating, each prospective juror should be questioned separately, outside the hearing of other prospective jurors. This expert testified that over 20% of the American adult population has personally encountered a sex abuse or wife-battering situation, and that such people are not able to evaluate evidence of similar situations in an objective manner

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[2] This motion requested that the court order individual *voir dire* on issues of publicity, child abuse and battered wives; that *voir dire* on other subjects be conducted in groups of 6 prospective jurors; and that the *voir dire* process be sequestered so that no other prospective jurors would be present except those being questioned.

because an abused person tends to blame herself, and thus would judge the defendant in this case more harshly than would a juror without such personal experience or exposure to an abusive situation. Tape 2, 7/19/84, State Record.

The trial judge denied the defense motion to sequester and question each juror privately on sensitive matters. Instead, the court divided the jury panel into two groups, each to be *voir dired* as a whole, with a statement by the court advising that any juror could answer questions in private. Each party's *voir dire* was to be limited to one hour, with a possible extension if the attorney used his time "diligently." The defense request that the panel be required to complete a jury questionnaire was denied.[3]

The panel was divided into two groups with 29 prospective jurors in each. The court informed the first group that they could answer questions in private, but that he preferred answers in open court because inquiries in chambers were difficult. Tapes 1 and 2, 7/24/84, State Record. Any juror who had discussed the case was questioned in chambers. Defense counsel questioned this panel about their attitudes concerning child abuse and neglect, and asked the entire panel if any of them had seen the effects of child abuse. Four answered affirmatively and discussed their experiences. Wife abuse was

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[3] Vol. I, State Record, Motion for Supplemental Jury Questionnaire, filed 7/23/84. This questionnaire was designed to elicit general background information on each juror, so that during *voir dire* the defense counsel could concentrate his questions on wife and child abuse, and jurors' attitudes towards justifiable homicide, etc.

also discussed and counsel sought juror's opinions on self defense, etc. Defense counsel was stopped after one hour, and his request for more time to examine the panel about their knowledge of Robert Burton, potential witnesses and exposure to publicity was denied upon the ground that counsel had not been "diligent." Tape 5, and Chambers Tapes C & D, 7/24/84.

One of the jurors in this panel, Lisa Zoeller, told the court in chambers that she could not be an impartial juror because her father had abused her mother and the children, but her mother had not killed her father. Chambers Tape C. The juror Zoeller was excused by the court for "Cause." Vol. II, State Record, p. 191.

There was a similar *voir dire* of the second group, except that this time, the court asked more specific questions about publicity and their knowledge of prospective witnesses. Defense counsel told the members of this panel that any questions on sensitive subjects could be answered privately in chambers, and he then discussed child abuse, rape, wife beating, the reporting of violent acts against women and the subject of self-defense. Defense counsel specifically asked which jurors had personally seen the effects of child abuse. Carolyn Green answered that she had worked for a school where most of the staff and children had been abused in some way, describing the effects of child abuse which she had observed. Counsel then asked whether anyone else had "seen those kinds of, (sic), or had contact with child abuse or sexual abuse?". There was no answer. Tape 8, State Record. Counsel again asked at a later time if there were "anybody else who has anything that they'd like to share either with the court individually or with me at this

time in terms of the things we've talked about? . . . We've talked about child abuse. We've talked about battered wives and other things." There was no response. No member of this panel discussed abuse in chambers. The defense challenged juror Green for cause upon the ground that she had experienced violence in her home, rape, and contact with abused children. The challenge for cause was granted, and Green was removed from the panel. Another juror in this panel, Mrs. Russell, was excused by the Court for cause because of her opinions about child abuse after having read an El Paso Times article. State Record Vol II, pp. 190 and 329.

At trial Shirley Burton and other witnesses testified about the violent and abusive nature of Robert Burton.[4] The jury heard evidence that during prior marriages, Burton had beaten two other wives and raped one of them, and had sexually molested a stepdaughter. Defendant Shirley Burton testified that during her marriage to Robert Burton she was beaten, raped and sodomized by her husband, and that he frequently beat their son, Gene, and her daughter, Elizabeth whom he had legally adopted. The children were beaten with fists, whips, rope, halter, belts, or whatever was handy. Mrs. Burton

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[4] As noted, there was a conflict in the evidence concerning Mrs. Burton's motive in shooting her husband, and the state presented evidence that Robert Burton was a law-abiding, esteemed member of the community, without a reputation for violence. It should be noted that Mrs. Burton's testimony regarding physical abuse of herself and her children was corroborated by several witnesses. The Court has summarized the evidence presented by the defense for the purpose of evaluating the claim of juror bias and lack of impartiality.

testified that she had tried to leave Robert several times, but had returned because of threats to her children, and that she had not contacted the police for protection because of his threats of retaliation if she did so. In January, 1983, Mrs. Burton learned that Robert had been sexually molesting Elizabeth and his son Gene for the past ten years. At trial, Elizabeth testified that her father had raped her twice and attempted to rape her on other occasions. Mrs. Burton obtained a gun and hid it under the mattress on her side of the bed, but Robert found it. The abuse continued. In May, 1983, Mrs. Burton returned home and found Robert attempting to rape Elizabeth. Mrs. Burton was then badly beaten and sodomized. In June, 1983, Robert cut Mrs. Burton with a knife and stitches were required. On August 12, 1983, Robert again attacked Elizabeth, and knocked her to the ground. On August 13, Mrs. Burton traveled 70 miles to Ruidoso and obtained a gun. She testified that her purpose was to stop Robert from hurting or killing her children and herself. She stopped on her way back home to Roswell and test-fired the gun. When she arrived in Roswell she parked three blocks from home, walked through the back gate, entered the patio door, and walked into the bedroom. She testified that Robert looked at her, said "If you're going to use that thing, use it," and rolled toward her. She fired several times, Robert jumped up and then fell, shouting obscenities. Mrs. Burton then ran out and drove back to her friends in Ruidoso. When police arrived at 3:00 a.m. on August 14, Robert was standing at the doorway. He told the police that it was too dark for him to see who shot him. He died later from three bullet wounds.

The defense presented expert testimony concerning "battered woman's syndrome" and the effects of long-term domestic violence. It was the experts' opinions that Shirley Burton lived in constant fear for herself and children and that she believed her only recourse was to kill her husband.[5]

The jury returned its verdict of first-degree murder on August 9, 1984. On August 29, the defense filed a motion for new trial, complaining, among other grounds, of inadequate *voir dire* of the jury, which was conducted in groups too large for meaningful discussion, and of the failure to give the defense adequate time to inquire into serious issues. The affidavit of Michael L. Stout, attorney for Shirley Burton, which accompanied the motion for new trial, informed the court in this manner: (Vol. II State Record, pp. 298-299)

"I have contacted several jurors who sat during the trial of this cause and have discovered the following information:

A. At least three of the jurors have been close to situations concerning abuse of some sort which was not discussed during jury selection, including Mr. Smoot and Ms. Gonzales, as shown by their affidavits.

B. One juror, Ms. Townsend, stated that she had knowledge of abuse in a very "close relationship" to her. She stated that the person, though battered, is still alive and hasn't killed anyone. As a result of her knowledge she believes that battered people can cope with the situation without resorting to violence. She believes that

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[5] Dr. Jeffrey Collins, a psychiatrist, and Dr. Rappaport, a clinical psychologist testified concerning Mrs. Burton's state of mind at the time she killed her husband.

this knowledge served as a springboard to her opinion that Shirley Burton 'could have handled' her situation without killing.

C. One juror stated that she has been the subject of long-standing abuse and is still married to the abuser, that the relationship is not as abusive as it once was, and that she did not wish to share the information in public for fear of harming her relationship or her family. Also her youngest child is presently seeing a counselor for emotional problems connected to the child's observation of the abuse of the juror and her other children. I would prefer to give the juror's name privately so as to not endanger her or her family."

The motion for new trial was denied on September 4, 1984.[6] (State Record, Vol. II, p. 306).

On September 5, 1984, the defense filed a second motion for new trial, reiterating that "Persons who have had experiences relevant to the issues in this case and which affect their impartiality in a case of this nature served as jurors in this case," in violation of Mrs. Burton's right to trial by impartial jurors. Vol. II State Record, pp. 308-309.

In connection with this motion for new trial, the defense presented an affidavit filed October 1, 1984, from one juror, identified as "S.G.G." or "Mrs. G," who stated that she had "been the subject of wife abuse in the past and (is) presently subject to abuse to a lesser degree." This juror stated that her husband had a violent temper and verbally and physically abused the family, at one

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[6] There is no audiotape in the record for the hearing held September 4, 1984.

time hitting his son across the back with a golf club, which resulted in the need for medical attention. One of her children was seeing a counselor for emotional difficulties related to the abuse. This juror requested that her name and testimony be kept secret because she feared her husband might abuse her and her children if he found out that she was making this statement.[7]

At this hearing in chambers "Mrs. G" testified that when the panel was asked about child abuse during *voir dire,* that she did not "connect" her own experiences with the discussion and that she tried not to think about her own situation. (Tape 1, 10/1/84). It is significant that in October, two months after the trial, Mrs. G still feared that her husband would find out about her testimony and would harm her or her family.

The audiotape of this testimony in chambers reveals that even in that *in camera* setting the juror was struggling with fear and great emotional distress because of her own abusive situation.

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[7] Tapes relating to Mrs. G's testimony in chambers have been sealed to protect her anonymity.

The trial court ordered that the following affidavits should be sealed and not opened unless by order of the District or Supreme Court of New Mexico: (Vol. II State Record, p. 396)

Four Jurors, filed 9-7-84
Michael L. Stout, filed 9-7-84
Beth Owens, filed 9-7-84
"One Juror", filed 10-1-84
Michael L. Stout, filed 10-3-84

The affidavits of Beth Owens, and the "Four Jurors" are not included in the state record filed in this appeal.

On October 9, the trial court denied the motion for new trial, finding that: (State Record, Vol. II, p. 337)

"1. None of the jurors was incapable of performing his or her duties as a juror.

"2. No juror, after being asked, withheld relevant information during voir dire."

Mrs. Burton's conviction was affirmed by the Supreme Court of New Mexico. That court found that defendant was not denied the opportunity to ask all relevant questions of the jury panel and that the trial court did not abuse its discretion in refusing to permit extensive questioning by defense counsel. That court further found that defendant had failed to establish partiality on the part of the juror, Mrs. G., that "no evidence is presented to demonstrate any prejudice" to defendant, and that there was no error in denying a new trial.

Mrs. Burton's federal application for a writ of habeas corpus was reviewed by William H. Deaton, United States Magistrate for the District of New Mexico, and his findings were adopted by the district court. The magistrate found that under the evidence, the situation of the juror, Mrs. G., was such that it made her impliedly biased, no matter how impartial she professed to be, and that Mrs. Burton had been deprived of her right to an impartial jury. In addition, the magistrate found that the one-hour restriction on *voir dire* and the refusal to allow sequestered *voir dire*, deprived the petitioner of her right to due process and an impartial jury.

The right to trial by an impartial jury is a fundamental concept of due process. That right, and the duty of

strict inquiry into its application, were discussed in *Irvin v. Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751 (1961), where it was found that pretrial publicity had tainted the jury panel:

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent jurors. . . . "A fair trial in a fair tribunal is a basic requirement of due process.". . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn". . . . His verdict must be based upon the evidence developed at the trial." (6 L. Ed.2d 755). (citations omitted)

While jurors need not be totally ignorant of the facts and issues involved, that fact does not foreclose inquiry into whether there has been a deprivation of due process of law. *Irvin v. Dowd, supra*, 6 L. Ed. 2d 756.

In a civil case tried in a federal district court, a juror's son had sustained injury in an accident. The juror did not respond to a *voir dire* inquiry concerning "previous injuries . . . that resulted in any disability or prolonged pain or suffering" to a juror's immediate family. The court of appeals found that the failure to respond had prejudiced plaintiffs' right of *peremptory challenge*. On appeal, the Supreme Court found that the fact that a juror might have been peremptorily challenged was not alone sufficient to reverse a conviction, and that in order to be

entitled to a new trial in such a situation, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, *and then further show that a correct response would have provided a valid basis for a challenge for cause.*" *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 78 L. Ed 2d 663, 671 (1984) (emphasis supplied).

In *Baca v. Sullivan,* 821 F. 2d 1480, (10th Circuit 1987) the *McDonough* rule was applied in ruling on a habeas corpus petition filed by a state defendant who complained that a juror's incorrect answers on a jury questionnaire and his failure to answer an oral question during *voir dire,* so prejudiced his right to exercise *peremptory* challenges that he was denied a fair trial. The jury questionnaire asked if any member of the juror's family at present or in the past was or had been a member or employee of any law enforcement agency. Juror Beserra, who served as jury foreman, answered "no," although his brother had recently retired after working more than 30 years as a police officer. On *voir dire* the panel was asked "Are there any persons on this panel who have either a relative or a close friend who might work for a police department either in Albuquerque or some other city?". Eight people responded, but the juror Beserra remained silent, even though another juror mentioned that his brother was a retired military police chief.

In *Baca,* a panel of this court found that defendant had "failed to demonstrate that Beserra was partial or that defendant was denied his constitutional right to be tried by an impartial jury." 821 F. 2d at 1483. In so doing, the court reviewed the state of the law in this manner:

> Although a prima facie showing of impairment of a party's peremptory challenges may entitle that party to an evidentiary hearing. . . . "(t)he fact that (the) juror might have been peremptorily challenged by defendant is not alone sufficient to reverse defendant's conviction," *Williams v. United States*, 418 F. 2d 372, 377 (10th Cir. 1969). In *McDonough Power Equip., Inc. v. Greenwood*, . . . the Supreme Court stated that "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination."
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> > "A party who seeks a new trial because of non-disclosure by a juror during *voir dire* must show actual bias." *United States v. Perkins*, 748 F. 2d 1519, 1532 (11th Cir. 1984), either "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *id.* (quoting *United States v. Nell*, 526 F. 2d 1223, 1229 (5th Cir. 1976). "(T)he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215. . . . At such a hearing, evidence of dishonesty and the subject matter of the nondisclosed information are relevant to the inquiry into alleged partiality." 821 F. 2d at 1483.

In finding that there had been no denial of a fair trial, since the defendant failed to demonstrate that Beserra was partial, the *Baca* court noted that defendant did not contend that he was not given a full, fair and adequate

evidentiary hearing, that the trial court found that juror Beserra was not partial, a finding entitled to the presumption of correctness, and that this finding was in fact supported by the record. In this respect, the court observed that the oral question at *voir dire* was presented in the present tense, so that Beserra had no objective duty to respond since his brother was no longer in law enforcement.

In the very recent case of *United States v. Gillis* ___ F. 2d ___ (No. 90-8064, 10th Circuit, 8/12/91), a federal defendant alleged that he had been denied a fair trial because members of the venire panel also sat on a panel in an earlier case in which he was tried on another narcotic charge, involving different conspirators.[8] The defendant's challenge of the entire panel for cause was denied and during *voir dire*, the trial judge did not inquire about knowledge gained from the first charge – instead, the jurors were asked generally if they knew "of any reason whatsoever" which could impair their impartiality. This court found that the "risk of a biased jury was significant," that the trial court had failed to conduct an adequate examination "to negate the risk of prejudice," and that a new trial was required.

State court findings relating to juror bias "are factual determinations to which the presumption of correctness under 28 U.S.C.A. Section 2254(d) apply, although the

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[8] Of 32 prospective jurors on the panel at the second trial, at least 15 were present at the selection of the other jury one month previously. Three persons present on both panels served as trial jurors in the second trial. They had been excused during the voir dire examination at the first trial.

constitutional standard of jury impartiality is a question of law. *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12, 81 L. Ed. 2d 847, 857, note 12 (1984); *Lincoln v. Sunn*, 807 F. 2d 805, 815-816, (9th Cir. 1987). In *Lincoln, supra*, the state prisoner alleged that he was denied a fair trial because of excessive pretrial publicity. While noting that a "preconceived notion as to the defendant's guilt or innocence, without more, does not rebut a juror's presumed impartiality, as long as the juror can lay aside his or her impression and render a verdict on the evidence," the court observed that "a juror's assertion of impartiality is not dispositive, if the defendant can demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' " 807 F. 2d at 815. In *Lincoln*, the circuit held that the district court had an independent duty to ascertain whether the presumption of correctness should attach to the state court factual findings, and remanded the case for this purpose.

The state court finding that "No juror, after being asked, withheld relevant information during voir dire," and that "None of the jurors was incapable of performing his or her duties as jurors," is presumed to be correct unless "the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." 28 U.S.C.A. Section 2254 (d)(8). *Braley v. Shillinger*, 902 F. 2d 20 (10th Cir. 1990), *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed. 2d 78 (1982). In *Smith*, a juror who sat on the state jury which convicted Phillips of murder applied for a job as an investigator in the prosecutor's office during the trial. The prosecutor withheld the information from the trial court and defense counsel until after the trial. Following

a hearing, the trial judge found that the juror's application was an "indiscretion," but that it did not reflect a premature conclusion of guilt or prejudice against the defendant, "or an inability to consider the guilt or innocence" of the defendant based solely upon the evidence.

In finding no merit to Phillips' due process claim, the Supreme Court found the state trial court's findings to be "presumptively correct" under 28 U.S.C.A. Section 2254(d), and not to be disturbed "unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence." As to Phillips' claim, the Supreme Court noted that neither the federal district court, nor the court of appeals took any issue with the findings of the state court.

During the murder trial in the *Braley* case, *supra*, 902 F. 2d 20, defense counsel received anonymous calls reporting that two jurors knew the victim's father, and that the father had two of the jurors "in his pocket." Affidavits were filed after trial indicating that the two jurors initially refused to vote for anything less than first-degree murder, and that these jurors eventually swayed the jury to a verdict of second-degree murder instead of manslaughter. At a hearing, the father and the two jurors testified and denied any contact or improper influence and the trial court denied the motion for new trial. The denial of habeas corpus relief was affirmed by a panel of this court upon a finding that the case was governed by the *Smith* decision, and that the petitioner had failed to establish any exception to the presumption provided by Section 2254 (d).

In Mrs. Burton's case, the federal district court determined that the record did not support the conclusions of the state trial court. Our review of the record is in accord, and we here quote those findings in some detail, since they fairly summarize the state court proceedings: (Vol. II, Federal record, Item 45, Magistrate's Amended Proposed Findings and Recommended Disposition, pp. 7-9):

> 13. In this case, the juror testified that when asked about child abuse she did not connect her abusive experiences with the *voir dire* discussion and that she tried not to think of her own situation by pushing her thoughts of her abusive experiences to the edge of her consciousness. Tape 1 (Chambers Oct. 1, 1984). The trial court found that the juror had honestly (not consciously) failed to mention her family's history of abuse during *voir dire*. The record, however, does not fairly support that finding of honesty. The *voir dire* centered around the topics of child and wife abuse. If so requested by a juror, the trial court permitted individual questioning on these sensitive topics. Yet the juror did not speak up at that time. Nonetheless, the juror was conscious of the fact that her family situation was abusive when she submitted an affidavit after the trial describing her situation. Affidavit of S.G.G. (filed Oct. 1, 1984). Under these circumstances, it is hard to believe that the juror honestly answered the abuse *voir dire* questions.[9] Had the juror spoken up, she would have been dismissed for cause as two other jurors had been who had revealed substantial exposure to

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[9] Mrs. G was a member of the second group of jurors which was *voir dired*.

family abuse. Since the record does not fairly support a presumption of correctness of the trial court's finding that the juror was honest, that presumption is overcome. Thus *McDonough* applies and petitioner is entitled to a new trial.[10]

Assuming that the juror had answered the *voir dire* question honestly, the record still would not have fairly supported the presumption of correctness of the trial court's finding of juror impartiality under *Baca*. Although the juror did not admit to bias, the facts in her case show such a close connection to the petitioner's that bias must be presumed. First, the juror's affidavit stated that she has "been the subject of wife abuse in the past and (is) presently subject to abuse to a lesser degree." . . . She also stated in her affidavit that her "youngest child is presently seeing a counselor for emotional difficulties which are related to the abuse that my other children and I have received and which he has witnessed." . . . Moreover, the juror testified that her husband has a violent temper that results in his hitting and verbally abusing the family . . . For example, her husband at one time hit her son across the back with a golf club . . . The juror also indicated that she wanted her affidavit and testimony kept secret, because

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[10] As previously noted, the *McDonough* test for obtaining new trial because of the absence of an impartial jury requires that during *voir dire* a juror failed to honestly answer a material question, and secondly, that a correct response to *voir dire* questions would have formed a valid basis for a challenge for cause.

Actual bias may be found either by an express admission, or by proof of specific facts which show such a close connection to the facts at trial that bias is presumed. *Baca v. Sullivan, supra,* 821 F. 2d 1480, 1483.

> she feared her husband might do something bad to her and her children should he find out. Furthermore, a forensic psychologist testified that people exposed to abuse would almost always unfairly judge a case involving abuse.

Whether a juror's bias may be implied from the circumstances is a question of law for this court. *Smith v. Phillips*, 455 U.S. 209, 222, n* (1982) (J. O'Connor, concurring); *Cummings v. Dugger*, 862 F. 2d 1504, 1509 (11th Cir. 1989). Doubts regarding bias must be resolved against the juror. *United States v. Nell*, 526 F. 2d 1223, 1230 (5th Cir. 1976), where the rule was so aptly expressed in this manner:

> We have no psychic calibers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment. Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid.

We will not discuss at length the similarities of the experiences of Mrs. Burton and the juror, Mrs. G. It is sufficient to note that the abuse, both mental and physical, continued over a long period of time and that the juror, at the time of trial, was living in an abusive situation, fearing her husband's violent temper even at the time she was testifying in chambers. Petitioner has presented a number of cases involving implied bias in situations which are similar to those we have here. In *United States v. Eubanks*, 591 F. 2d 513, 517 (9th Cir. 1979), the court found that the fact that a juror's sons used heroin barred

any inference that juror could be impartial in a case in which defendants were charged with distributing heroin; in *Jackson v. United States,* 395 F. 2d 615 (D.C. Cir. 1968), a juror was presumed to be biased because he had been a lover in a love triangle similar to the one involved in the case at issue; in *United States v. Allsup,* 566 F. 2d 68, 71-71 (9th Cir. 1977) and *United States v. McCorkle,* 248 F. 2d 1 (3rd Cir. 1957), *cert. den.* 2 L. Ed. 2d 77, *rehearing denied,* 2 L. Ed. 2d 263, jurors were found to be biased because of their banking ties and robbery experience in cases involving bank robberies; and in *State v. LaRue,* 722 P. 2d 1039, 1042 (Hawaii 1986), it was found that a victim of child abuse could not be impartial in a case involving sexual abuse of a minor.

Here, the record is clear that Mrs. G was dishonest in her response to questions on *voir dire* – this is true whether or not she simply did not, or could not respond properly because of her own emotional distress. This dishonesty, of itself, is evidence of bias. See *U.S. v. Colombo,* 869 F. 2d 149, 152 (2d Cir. 1989); *Consolidated Gas & Equipment Co. of America v. Carver,* 257 F. 2d 111, 115 (10th Cir. 1958); *U. S. v. Scott,* 854 F. 2d 697, 699 (5th Cir. 1988).[11]

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[11] The State relies upon *Brown v. United States,* 356 F. 2d 230 (10th Cir. 1966), where the brother of a juror had been murdered some years before trial. The court found no violation of the right to impartial trial where there was no evidence in the *voir dire* proceeding of the juror's relation to his brother and no information about how the brother's murder had affected the juror. The *voir dire* question concerned attacks upon the jurors "immediate family" and defense counsel did not explain what he meant by "immediate family". In finding there was no abuse of discretion

We likewise find that Mrs. G's failure to respond on *voir dire* denied Mrs. Burton a fair trial under the *McDonough* test, for it is clear that the juror did fail to answer a material question, and that a correct response would have provided a basis for a challenge for cause. Had Mrs. G responded honestly, she would have been excused for cause. That is exactly what happened to jurors Green and Zoeller who revealed their exposures to family and child abuse.

We find that the record establishes that Mrs. G's silence and the inherently prejudicial nature of her own family situation deprived Mrs. Burton of her right to a fair trial by an impartial jury, and that she is entitled to a new trial. Because of our finding on this issue, we need not and do not reach any other issues in the case.

The judgment of the district court requiring a new trial is AFFIRMED.

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in denying a new trial, the court noted that "(t)he record here does not disclose that the juror either failed to give a truthful answer to the question propounded, or conceal a known disqualification." 356 F. 2d at 233.

In the case now before us, the record is clear concerning abuse which directly affected the juror and her children, and the juror's refusal to give a truthful answer.

90.2016 and 90-2019, *Burton v. Johnson*

**ANDERSON**, Circuit Judge, dissenting

I respectfully dissent because I think the majority opinion is not based upon proper constitutional analysis, and creates an erroneous rule of constitutional law.

We examine habeas challenges to state court proceedings, including *voir dire* of jurors, only for constitutional error, not for infractions of rules imposed on federal courts through the exercise of supervisory authority. *Mu'min v. Virginia*, 111 S.Ct. 1899 (1991). The Constitution permits state trial courts great latitude in conducting *voir dire*, including inquiry into subjects which might tend to show juror bias. *See id.* at 1904, 1906. "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id.* at 1905. (citing *Murphy v. Florida*, 421 U.S. 794, 799 (1975)).

Contrary to arguments advanced in this case, the Due Process Clause of the Fourteenth Amendment does not require state court judges to question jurors individually, or to question jurors in private, or to ask detailed, content based questions of jurors, or to question jurors or permit the questioning of jurors for any particular length of time, or even to permit peremptory challenges of jurors. *Id.*

Thus, it is clear at the outset that the *voir dire* examination conducted in this case did not violate the Fourteenth Amendment. There was extensive inquiry of the prospective jurors, and the general subject of abuse was raised, although inartfully. The jurors were all given an

opportunity to express reservations either openly, or in a private meeting with the judge. That process was constitutionally sufficient.

The court below and the majority opinion both base their conclusions on a presumption of a bias, reasoning first that anyone who has experienced some sort of abuse personally or in their family is constitutionally disqualified from sitting on a case where some sort of abuse is raised as a defense. Second, the court below and the majority reasoned that the juror in question here, a "Mrs. G", "was *dishonest* in her response to questions on *voir dire*, Maj. Op. at 20 (emphasis added); therefore, she was constitutionally disqualified because of bias, and the dishonesty resulted in her not being stricken for cause. These arguments intertwine Sixth and Fourteenth Amendment considerations. I have no problem with that since the constitutional analysis as to bias is the same for each. In each instance, however, the court below and the majority have failed to address directly the right threshold question. *Mu'min* is instructive on the point.

The petitioner in *Mu'min* claimed that the trial court's failure to examine jurors individually regarding their exposure to pretrial publicity violated his Sixth and Fourteenth Amendment rights. He contended that the harm from possible pretrial knowledge of incriminating facts not admissible in evidence was even greater than the possible existence of racial or ethnic prejudice from the standpoint of necessary *voir dire*. In support, the petitioner cited the American Bar Association Standards for Criminal Justice. The Supreme Court rejected the premise

of prejudice and disqualification underlying the Standards, pointing out that the wrong question was being asked. The court stated:

> But, more importantly, the standards relating to *voir dire* are based on a substantive rule that renders a potential juror *subject to challenge for cause, without regard to his state of mind,* if he has been exposed to and remembers 'highly significant information' or 'other incriminating matters that may be inadmissible in evidence.' *That is a stricter standard of juror eligibility than that which we have held the Constitution to require.* Under the ABA standard, answers to questions about content, without more, could disqualify the juror from sitting. *Under the constitutional standard, on the other hand, [t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'*

*Id.* at 1907-08, (quoting *Patton v. Yount*, 476 U.S. 1025, 1035 (1984) (emphasis added)).

Under this analysis, then, the majority opinion is clearly wrong to begin with when it states that "[h]ad Mrs. G responded honestly [that there had been some abuse in her family], she would have been excused for cause". Maj. Op. at 21. She should only have been disqualified on constitutional grounds if questioning disclosed that "she had such fixed opinions that she could not judge impartially the guilt of the defendant." *Id.*

The same is true of implied bias. The court below and the majority *presume* disqualification without at least asking and directly analyzing the relevant question: Did Mrs.

G in fact have such fixed opinions that she could not judge impartially? She indicated she could. The state courts found she could, and, neither the court below nor the majority even begin to demonstrate convincing proof of actual bias.

Of course, "[i]n those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes." *Smith v. Phillips*, 455 U.S. 209, 223 n* (O'Connor, J., concurring). But, if the majority is fashioning a conclusive presumption of bias on constitutional grounds in abuse cases, it does so without support, and I believe it to be bad constitutional law. Justice O'Connor described constitutional presumptions correctly, I believe, as follows:

> [t]here are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

*Id.* at 222 (O'Connor, J., concurring). A case like the one before us hardly falls in the categories described, any more than a situation similar to *Mu'min* where a juror has been exposed to incriminating information about the defendant. People *are* capable of judging fairly on the evidence in these situations.

Cases cited by the majority such as *Irvin v. Dowd*, 366 U.S. 717 (1961) and *United States v. Gillis*, 942 F.2d 707 (10th Cir. 1991) have either been distinguished in *Mu'min*,

or have failed, as does the majority opinion here, to take *Mu'min* into account in their analysis. Other cases cited by the majority, including *Gillis*, are intertwined with federal supervisory standards and do not present a pure constitutional analysis.[1] In short, there is no convincing authority which supports a constitutional presumption of bias in abuse cases.

Finally, I strongly disagree with the majority's "finding" that Mrs. G was dishonest, and its use of that finding to support an inference of actual bias. Honesty is a pure credibility finding which the state trial court which examined Mrs. G on the subject, had the right to make. It is not enough for the majority to recognize the rule that state court findings are entitled to a presumption of correctness, 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 551 (1981); *Case v. Mondragon*, 887 F.2d 1388 (10th Cir. 1989), and then to override that presumption because the majority thinks it can read the record better than the state courts can determine credibility first hand. The statutory presumption of correctness accorded to state court findings "may be overcome only by *convincing evidence.*" *Smith v. Phillips*, 455 U.S. 209, 218 (1982) (emphasis added). And, issues of witness credibility, and findings based upon the court's opportunity to observe and evaluate the demeanor of the witness, are particularly subject to the presumption of correctness. *See Case v. Mondragon*, 887 F.2d 1393 (10th Cir. 1989). "Demeanor plays a fundamental role not only in determining juror credibility, but

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[1] In *Gillis*, moreover, the pertinent subject was not even addressed on *voir dire*. Here, it was.

also in simply understanding what a potential juror is saying." *Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984).

An examination of the *voir dire* conducted in this case discloses that at best it was ambiguous with respect to the subject of physical abuse, as opposed to sexual abuse, or sexual abuse coupled with other physical abuse. Mrs. G testified at the post-trial hearing that her situation did not involve sexual abuse

As the majority opinion acknowledges, at the hearing Mrs. G testified that when the panel of prospective jurors was asked about child abuse she did not connect her own experiences with the discussion. She denied deliberately withholding any requested information and, in fact, did not recall ever being asked on *voir dire* whether she had been a victim of wife abuse. She stated that she just did not connect her situation with the questions asked. She stated further that she never felt she had been asked a question on *voir dire* that called for an answer on the subject of abuse in her own family. She also said that she believed she would have responded had she thought that a response was called for.

In short, the most that can be said about the *voir dire* inquiry is that it was ambiguous with respect to putting Mrs. G in a position of a required response on the subject of abuse in her own family. She certainly gave no dishonest answer, since she remained silent. And, her silence, as found by the trial court which had an opportunity to observe her demeanor, and had first hand knowledge of the *voir dire* inquiry, was not dishonest. *See Baca v. Sullivan*, 821 F.2d 1480 (10th Cir. 1987); *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966).

Following the hearing, as the majority opinion notes, the state trial court specifically found that "no juror, after being asked, withheld relevant information during *voir dire*." The court further found that "none of the jurors was incapable of performing his or her duties as a juror." On direct appeal, the New Mexico Supreme Court upheld those determinations, and further found that their was no evidence demonstrating prejudice.

I believe it to be indefensible, on these facts, for the federal courts to make a finding on the honesty of this juror, directly at odds with the state court findings, and then to draw conclusions from that finding. Certainly there is no "convincing evidence" to support the majority's finding, as required by *Smith v. Phillips*. *See* 455 U.S. at 218.

Stripped of extraneous trappings, the majority opinion in this case stands only for the proposition, as a matter of constitutional law, that prospective jurors who have been abused in any way or who have had abuse in their families in some way at some time are automatically disqualified from sitting on cases in which abuse might arise as a defense, on the presumption that such prospective jurors are incapable of being impartial within the meaning of the Sixth Amendment. I disagree with such a rule, and with this supervisory/evidentiary resort to presumptions. "[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual* bias." *Smith v. Phillips*, 455 U.S. at 215 (emphasis added). "[P]reservation of the opportunity to prove *actual* bias is a guarantee of a defendant's right to an impartial jury." *Id.* at 216 (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)

(emphasis added)).[2] Except in the most egregious circumstances, federal habeas corpus courts ought to stay out of the business of speculating and presuming as to the state of mind of state court jurors, and overriding the first hand judgment of state courts on the actual facts of the subject.

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[2] Decisions to hold hearings, of course, and the conduct of such hearings, must be consistent with the rules of evidence applicable to post-verdict inquiry of jurors. See, e.g., *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHIRLEY BURTON,

Petitioner,

vs. Civ. No. 87-0557 JC

SHARON JOHNSON,

Respondent.

ORDER

(Filed Dec. 27, 1989)

THIS MATTER having come before the Court on the proposed amended findings and recommended disposition of the United States Magistrate, and objections to the proposed amended findings and recommended disposition having been filed, and the Court having made a de novo determination of those portions of the Magistrate's proposed amended findings and recommended disposition objected to;

IT IS HEREBY ORDERED that the proposed amended findings and recommended disposition of the United States Magistrate are adopted by the Court.

IT IS FURTHER ORDERED that the Petition be, and it hereby is, granted.

IT IS ALSO FURTHER ORDERED that the Petitioner be released unless a new trial is commenced within 90 days.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

## APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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| SHIRLEY BURTON,<br><br>Petitioner-Appellee/<br>Cross-Appellant,<br><br>v.<br><br>SHARON JOHNSON,<br><br>Respondent-Appellant/<br>Cross-Appellee, | ) | Nos. 90-2016<br>90-2017 |
| SHIRLEY BURTON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>SHARON JOHN, THOMAS RUTLEDGE, District Attorney, Fifth Judicial District of New Mexico, Carlsbad, N.M.; VERNON HENNING, Assistant District Attorney, Fifth Judicial District of New Mexico, Roswell, N.M.; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; THE STATE OF NEW MEXICO,<br><br>Respondents-Appellees. | ) | Nos. 91-2296<br>91-2297 |

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ORDER

Filed October 28, 1992

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Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, Anderson, Tacha Baldock, Brorby, Ebel and Kelly, Circuit Judges, and BROWN* District Judge.

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*Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

This matter comes on for consideration of Respondents/Appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

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## APPENDIX G

## SUPREME COURT OF THE UNITED STATES

*No.*

A-564

Sharon Johnson,

Petitioner

v.

Shirley Burton

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 27, 1993.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 26th
day of January, 1993.

ORIGINAL

Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respectfully submitted,

FEDERAL PUBLIC DEFENDER
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March 23, 1993

NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Tova Indritz, declare under penalty of perjury that I am a member of the bar of this court and counsel for Respondent, Shirley Burton, and that I personally mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari to this court by first class mail, postage prepaid by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, in the United States Mailbox at the U.S. Post Office at 500 Gold SW, Albuquerque, New Mexico, at approximately 5:00 p.m. on the 23rd day of March, 1993.

Tova Indritz

Tova Indritz
Attorney for Respondent
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NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Shirley Burton, through her attorney who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, respectfully moves this Court to grant leave to continue to proceed in forma pauperis. In support of this motion, counsel states:

1. The Federal Public Defender Organization for the District of New Mexico is an organization organized pursuant to 18 U.S.C. §3006A(h)(2)(A).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, United States Magistrate for the District of New Mexico appointed the Federal Public Defender Organization for the District of New Mexico on August 14, 1987, to represent Ms. Burton before the U.S. District Court on her petition for a writ of habeas corpus filed under 28 U.S.C. §2254.

3. On March 3, 1990, the United States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender for the District of New Mexico to represent Ms. Burton on the first appeal of her case to that court. On January 9, 1992, the United

States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender for the District of New Mexico to represent Ms. Burton on her second appeal before that court.

4. Ms. Burton has requested that her appointed Federal Public Defender file a brief in opposition to the petition for certiorari filed by Sharon Johnson in this Court.

5. Ms. Burton continues to be indigent.

Tova Indritz

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Respondent, Shirley Burton, submits the following brief in opposition to Sharon Johnson's petition for writ of certiorari.

## STATEMENT OF THE CASE

On August 9, 1984, Shirley Burton was convicted of the first degree murder of her husband, Robert Burton, after a jury trial held in Chaves County, New Mexico, district court. Burton v. Johnson, 948 F.2d 1150, 1153 (10th Cir. 1991)(hereinafter Burton I). Shirley Burton admitted that she shot and killed her husband in the early morning hours of August 14, 1983. She asserted that she did so in self-defense; she believed from Robert Burton's past behavior that she and her children were in immediate danger of great bodily harm, sexual abuse and death at his hands. Id. at 1151.

At the trial Shirley Burton testified that her husband beat, raped and sodomized her. He also frequently beat their son, Gene, who was 11 years old at the time of trial, and her daughter by a prior marriage, Elizabeth, who was 17 years old at the time of trial, with fists, whips, rope, halter, belts or whatever was handy. Id. at 1153. Ms. Burton's testimony regarding the physical abuse of herself and her children was corroborated by several witnesses, including Gene and Elizabeth Burton. Id., n. 4. Ms. Burton testified that she tried to leave her husband several times, but she had returned because he threatened to hurt her children. She had not contacted the police for protection because of his threats of retaliation if she did so. Id. at 1153.

In January, 1983, Ms. Burton learned that Robert had been sexually molesting their children for the past ten years. Elizabeth testified that her father had raped her twice and attempted to rape her on other occasions. Id. In May, 1983, Ms. Burton returned home and found Robert attempting to rape Elizabeth. Robert then badly beat Shirley Burton, ripped her clothes off and forcibly and painfully sodomized her, exclaiming that he could do whatever he wanted to against her and the children. Id. In June, 1983, Robert cut Shirley Burton with a knife. Stitches were required. Id. The day before the shooting, in front of Ms. Burton, Robert again attacked Elizabeth, angrily pushing her in the stomach and knocking her to the ground. Id. Ms. Burton testified that she shot and killed her husband in order to stop him from hurting or killing herself and her children. Id.

The defense presented expert testimony concerning "battered woman's syndrome" and the effects of long-term domestic violence. Ms. Burton had reached a state of absolute helplessness and desperation. It was the experts' opinion that Ms. Burton lived in constant fear for herself and her children and that when she shot her husband she believed her only recourse was to kill him. Id. The experts testified that, because Ms. Burton feared severe reprisals from her husband should she leave him or report his behavior to the police and because there were no successful structures established to deal with family abuse, Ms. Burton's decision to shoot Robert Burton was a reasonable one.

Nevertheless, the jury found Ms. Burton guilty of first degree murder. The trial court sentenced her to a mandatory term of life imprisonment. Id. at 1151. She served six years and one month of that sentence before being released by United States District Court Judge John E. Conway on appeal bond in January, 1990[1].

After exhausting her state remedies, Ms. Burton filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Mexico, challenging her conviction on a number of federal constitutional grounds. (Burton I, Document, ("Doc."), 1). On August 14, 1989, the United States Magistrate issued amended proposed findings and recommended that the petition be granted[2] and that Ms. Burton be released unless a new trial was held within 90 days. (Id., Doc. 45 at 22). The Magistrate found, among other things, that Ms. Burton's right to an impartial jury

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[1] In New Mexico a life prisoner must serve a minimum of thirty actual years in prison before becoming eligible for parole. A life prisoner under current prison practice does not receive any credit for good time to reduce his or her parole eligibility date. See N.M.Stat.Ann. §31-21-10(A) (1990 Repl. Pamp.); Martinez v. State, 772 P.2d 1305, 1306 (N.M. 1989). As the Tenth Circuit noted, Burton I, 948 F.2d at 1151, n. 1, Burton had been offered a seven year sentence for a plea to second degree murder, but she declined the offer and went to trial. Now, Ms. Burton has served more time in prison than she would have served had she accepted that offer and received the customary good time credit available to persons sentenced for second degree murder.

[2] The Magistrate's original findings held that Ms. Burton's constitutional rights were violated on three separate grounds; the amended findings found two constitutional violations. Only one ground was addressed by the United States Court of Appeals for the Tenth Circuit.

was violated because one of her jurors lived with an abusive husband and she failed to disclose that fact on voir dire.

On December 27, 1989, District Court Judge Conway entered an order adopting the Magistrate's amended proposed findings and the recommended disposition. In addition, the order stated:

> IT IS FURTHER ORDERED that the petition be, and it hereby is, granted. IT IS ALSO FURTHER ORDERED that the petitioner be released unless a new trial is commenced within 90 days.

Burton v. Johnson, 975 F.2d 690, 691 (10th Cir. 1992)(hereinafter Burton II). As Judge Conway has stated in an order dated November 23, 1992, (Petition for Writ of Certiorari, "Pet.", Appendix, ("App."), 2), by this order he intended that the state be afforded 90 days in which to commence a retrial of Ms. Burton, and that if the state did not commence the retrial within that time period, then the state would be permanently barred from ever retrying Ms. Burton, i.e., Ms. Burton would be "released" from her charges.

On December 29, 1989, Ms. Burton moved the district court, pursuant to Fed.R.App.P. 23(c), for her release pending either further action by the state or review by the Tenth Circuit Court of Appeals. Ms. Burton expressed a willingness to abide by any conditions set by the court and to appear for any retrial[3].

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[3] Warden Johnson notes in her certiorari petition that in Ms. Burton's release motion she asserted that the state would not be irreparably injured in the absence of a stay. (Pet. 5). The warden apparently wishes to imply that Ms. Burton had assured the court a stay of the writ granting order was not necessary to protect the state's interest in a new trial. This is not so. In her motion Ms. Burton assured the court that her release from

(Burton I, Doc. 49). A hearing on the motion was set for January 4, 1990. Warden Johnson filed a motion to vacate that hearing. In that motion, the warden acknowledged that it was her burden to overcome the presumption favoring Ms. Burton's release. (Id., Doc. 52). The warden's motion to vacate was denied.

On January 3, 1990, anticipating Ms. Burton's release from confinement, the state applied to the Chaves County district court for a bench warrant for Ms. Burton's arrest on the underlying murder charge and detention pending a hearing on conditions of release while the writ grant was reviewed on appeal by the Tenth Circuit. (Id., Doc. 54, Exhibit, ("Ex."), 1). Without notice to Ms. Burton or the federal district court, the Chaves County district court issued a bench warrant commanding Ms. Burton's arrest. (Id., Ex. 2).

On January 4, 1990, after a hearing on the matter, the federal district court entered an order setting conditions for Ms. Burton's release from incarceration. (Id., Doc. 53). Upon her enlargement that day from the Women's Correctional Facility in Grants, New Mexico, Ms. Burton was immediately arrested and held without bond on the state court warrant. (Id., Doc. 54 & 69). The federal district court claimed exclusive jurisdiction over the conditions of Ms. Burton's release and held the arrest

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prison would not harm the state. Her arguments had nothing to do with a stay of the retrial requirement, the deadline for which was almost three months away at the time she filed the release motion. Ms. Burton never made any contention that there was no need to stay the retrial deadline in order to preserve the state's ability to retry her.

unlawful. (Id., Doc. 54). The warrant was subsequently withdrawn by state district judge Schnedar on January 5, 1990[4]. Burton II, 975 F.2d at 691-692. Ms. Burton was released from prison on that date[5].

On January 24, 1990, warden Johnson filed a notice of appeal to the Tenth Circuit of the district court's order granting Ms. Burton's petition for habeas corpus relief. Ms. Burton cross-appealed certain claims resolved against her.

In accordance with the federal district court's order, on January 30, 1990, the Chaves County district court set the matter for a new trial on Ms. Burton's murder charge, to begin March 13,

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[4] The warden asserts that, by obtaining the issuance of the bench warrant, the state attempted to "rearrest and retry Ms. Burton." (Pet. 5). This is not true. As the application for bench warrant indicated, the state was attempting to detain Ms. Burton during the course of the warden's appeal, not for purposes of retrying her. Judge Conway was clearly right to preclude the state from usurping the federal judge's role in setting conditions for release on appeal of a federal court order. See U.S. ex rel. Thomas v. State of New Jersey, 472 F.2d 735, 741-744 (3rd Cir. 1973). By annulling the arrest warrant, the federal district court did not in any way prevent the state from retrying Ms. Burton. On the contrary, Judge Conway amended Ms. Burton's release conditions so that she could appear in state court for any pretrial hearings or any retrial and could visit her state court lawyer. (Burton I, Doc. 60).

[5] The warden insists that the state complied with Judge Conway's writ granting order by acceding to Ms. Burton's release. (Pet. 5, 9, 13). But, there were two parts to Judge Conway's order. First, the court granted Ms. Burton an immediate writ which entitled her to immediate release from custody. Secondly, he ordered that she be retried within 90 days. If she was not tried within that time frame, or the time period was not extended in some way, her retrial would be permanently barred. The state did accede to the court's order to physically release her from its custody. However, as related infra, the state did not comply with the second part of the order, i.e., to retry Ms. Burton by the court's deadline.

1990, within the 90-day period provided by Judge Conway. (Burton I, Doc. 69, Appendix A).

On March 6, 1990, well aware that Ms. Burton had already been released from confinement two months earlier, the warden filed a motion in federal district court seeking a stay of that court's order requiring a new trial within 90 days. (Id., Doc. 59). In her motion the warden assured the court that she did not seek Ms. Burton's re-arrest or the modification of Ms. Burton's release conditions. Rather, she requested a stay of that part of the order requiring a new trial within 90 days. A stay was necessary, she argued, to protect her right to appeal the writ granting order.

This stay motion makes it clear warden Johnson understood that under Judge Conway's December 27, 1989, order, the state would be barred from retrying Ms. Burton if the trial was not held within 90 days and a stay or reversal was not obtained. Since the warden did not contest Ms. Burton's physical release from custody, the warden had no reason to seek a stay or fear the loss of her right to appeal unless a permanent retrial bar was the sanction for a failure to meet the retrial deadline.

On March 8, 1990, Ms. Burton appeared through her state court counsel in Chaves County district court for a pretrial conference. At that hearing Ms. Burton announced that she was ready for a retrial any time within 90 days of the federal district court's order. However, the state prosecutor advised the trial court that the state was not ready to try the case. He

also informed the court that the attorney general was attempting to obtain a stay of the federal district judge's order. Judge Schnedar told the state he read that order to mean that Ms. Burton would be released from all charges if she was not tried within 90 days. Because the state was not ready to proceed, the trial judge vacated the March 13, 1990, trial setting, warning the state that it risked the consequences of failing to meet the federal court's deadline, if no stay was obtained. The trial court reset the case for trial on March 23, 1990, within Judge Conway's deadline. (Id., Doc. 72, attached transcript).

On March 12, 1990, the federal district court judge denied the warden's stay motion without explanation. On March 14, 1990, Ms. Burton's second state court trial setting was vacated at the state's request. The state did not appeal the denial of the stay or apply to the Tenth Circuit for a stay pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Without the benefit of a stay of execution, the state failed to retry Ms. Burton within the 90-day retrial deadline set by Judge Conway, which expired on March 27, 1990. Burton II, 975 F.2d at 692.

On appeal before the Tenth Circuit neither Ms. Burton nor the warden raised the conditional nature of the order or the effect of the expiration of the 90-day period. Id. On November 1, 1991, the Tenth Circuit filed an opinion affirming the district court's grant of Ms. Burton's writ, holding that Ms. Burton had been denied her right to trial by an impartial jury. Burton I. The Tenth Circuit's mandate issued November 25, 1991.

As the Tenth Circuit stated in the second appeal in this case, its mandate did not provide a remedy superseding the remedy provided by the district court. Since neither party raised the remedy issue on appeal, the Tenth Circuit's mandate affirmed the remedy that accompanied the district court's grant of Ms. Burton's writ. Burton II, 975 F.2d at 693.

On December 2, 1991, following the return of the mandate, Ms. Burton filed a motion in the underlying habeas action seeking the entry of a final order prohibiting the state from retrying her on the murder charge. (Burton I, Doc. 69).

The warden repeatedly claims in her certiorari petition that this motion came as a complete surprise to her because she had no notice that Ms. Burton's retrial would be permanently barred if Ms. Burton was not retried by March 27, 1990. (Pet. 5, 6, 7, 13). This claim contradicts the language of the district court's writ granting order, the court's subsequent conduct, the warden's own actions and common sense. By directing that Ms. Burton's "Petition be, and it hereby is, granted," the federal district court granted Ms. Burton's writ effective immediately[6]. As a result, Ms. Burton was presumptively entitled to immediate release from state custody. See Carter v. Rafferty, 781 F.2d 993, 994 & n. 1 (3rd Cir. 1986) overruled on other grounds, Hilton v. Braunskill, 481 U.S. 770 (1987). See also Hilton, 481 U.S. at 774; Bowen, 799 F.2d at 614, n. 12; Fed.R.App.P. 23(c).

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[6] It was well within the court's discretion to do so. Bowen v. Maynard, 799 F.2d 593, 614, n. 12 (10th Cir. 1986).

That the district court "further ordered" that the state must release[7] Ms. Burton if a new trial was not held within 90 days obviously meant that upon the state's failure to meet the deadline, Ms. Burton would acquire something more than release from physical custody; rather, she would then be totally released from the murder charge itself.

Moreover, as the Tenth Circuit noted, Burton II, 975 F.2d at 964, the district court's subsequent actions indicated that Ms. Burton's permanent discharge was the sanction for failure to retry her within the established time period. As soon as possible after the order granting the writ, the district court ordered Ms. Burton's release from the state prison. The next day the court invalidated the state's re-arrest of Ms. Burton. Thus, by his conduct Judge Conway revealed his intent that Ms. Burton's petition be granted immediately and, as a consequence, that she must be released immediately. Had the judge intended to merely provide for Ms. Burton's physical release from state custody if no trial was held by March 27, 1990, he would not have ordered her release long before that deadline arrived. The court's conduct, consequently, showed that Ms. Burton would be permanently released from the murder charge if she was not retried within 90 days of the December 27, 1989, order[8].

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[7] Significantly, the court ordered simply that Ms. Burton be "released" when the deadline passed without a retrial, not that she be released from custody.

[8] Of course, this interpretation is borne out by the district court's subsequent explicit holding that it did, indeed, intend that Ms. Burton's retrial be permanently barred if the state failed

The warden understood this when that order was entered, contrary to the warden's claim now. At that time, the warden conceded that Ms. Burton was presumptively entitled to release immediately after the order, not after the 90-day deadline expired. In addition, as noted above, the state's stay motion acknowledged that Ms. Burton's retrial would be permanently barred if she was not retried by March 27, 1990, and the stay motion was not granted.

Nevertheless, the warden opposed Ms. Burton's December 2, 1991, motion to bar her retrial and demanded she surrender herself to be incarcerated pending her new trial. Ms. Burton filed a second habeas action challenging the state's authority to retry her and in that action sought a temporary restraining order, ("TRO"), and a preliminary injunction preventing the state from incarcerating and retrying her. (Burton II, Doc. 1 & 2). Following a hearing on December 6, 1991, the district court granted the TRO until a hearing on the preliminary injunction could be held on December 16, 1991. (Id., Doc. 6). At the latter hearing, ruling that he did not have the authority or jurisdiction to permanently discharge Ms. Burton, Judge Conway dissolved the TRO, denied the preliminary injunction and the motion for a writ permanently barring retrial. Burton II, 975 F.2d at 692.

Ms. Burton appealed the district court's decision in those regards to the Tenth Circuit. Ms. Burton also moved for an

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to retry her by the deadline it set. (Pet., App. 2).

injunction preventing a retrial pending the Tenth Circuit's disposition of the appeal. The Tenth Circuit granted that motion. Id.

On September 11, 1992, the Tenth Circuit issued its opinion upon the second appeal in this case. Burton II. The court ruled that a district court has the authority to permanently discharge a successful petitioner in a habeas corpus case "where it deems such a remedy appropriate." Id. at 693. The court also stated, however, that, in exercising its broad habeas corpus authority, "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted." Id. The court held, nonetheless, that the state was "precluded from obtaining substantive review of whether permanent discharge in the case at hand constitutes an abuse of the District Court's discretion." Id. The Tenth Circuit reasoned that, since neither party appealed the remedy issue in the first appeal, although the original December 27, 1989, writ granting order was an appealable final judgment, the parties had waived any challenge to the remedy prescribed by the order. Id. at 693-694.

Consequently, the Tenth Circuit remanded the case to the district court to interpret and clarify its December 27, 1989, order. The Tenth Circuit instructed the district court to interpret and clarify the order to reflect its contemporaneous intent and not to reflect a new and subsequent intent. Id. at 694.

Upon remand, on November 23, 1992, the district judge held

that at the time of the entry of its writ granting order, he intended that "the State be afforded 90 days in which to commence a retrial of petitioner, and that if the state did not commence the retrial within that 90 day period, then the state would be permanently barred from ever retrying petitioner." (Pet., App. 2). Accordingly, the district court permanently discharged Ms. Burton, forever barring the state from retrying her on the murder charge. (Id. 3).

## SUMMARY OF THE ARGUMENT

Petitioner Johnson is seeking this Court's review of an issue which was not properly before the lower courts and is not properly before this Court. Warden Johnson asks this Court to determine the standards that govern the exercise of a federal district court's power to permanently discharge a successful habeas corpus petitioner. (Pet. i). But, as the Tenth Circuit Court of Appeals held below, Burton II, 975 F.2d at 694, the warden waived any contentions regarding a retrial bar by failing to appeal the permanent discharge remedy when it was initially imposed. As a consequence, the Tenth Circuit never reached the question the warden requests this Court to review.

The warden repeatedly claims the Tenth Circuit's decision in this case establishes a dangerous precedent setting district courts free willy-nilly to bar the retrials of successful habeas petitioners. This is clearly not true, since (a) the district court allowed the state 90 days to retry Ms. Burton and (b) the Tenth Circuit never even reached the issue of when permanent

discharges are appropriate. The Tenth Circuit did state in this case that "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted" and noted that generally barring retrial is not an appropriate remedy when a habeas corpus writ is granted. Id. at 693. This conclusion is very much in line with the case law of all the other federal circuit courts of appeal, including the cases cited by the warden in her petition.

Far from presenting issues of enormous importance, as the warden contends, this case presents a narrow, peculiar, fact-bound procedural issue that was decided in conformity with well-established authority and is not even raised as an issue in the warden's certiorari petition. This case involves a situation that is unlikely to ever recur, unless another warden is represented as ineptly as was warden Johnson. The warden had many opportunities to preserve the state's ability to retry Ms. Burton and took advantage of none of them. Because the warden has procedurally forfeited review of the question she presents in her petition and because the actual issue in this case is insignificant, fact-bound and not raised in the certiorari petition, this Court should deny certiorari.

## ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

**THIS COURT SHOULD DENY CERTIORARI IN THIS CASE BECAUSE THE CERTIORARI PETITIONER HAS FAILED TO PRESERVE THE QUESTION SOUGHT TO BE REVIEWED, THE TENTH CIRCUIT'S DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION.**

The "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). See also Canton v. Harris, 489 U.S. 378, 384 (1989). As a consequence, this Court is extremely loathe to address questions presented in a certiorari petition that have not been properly preserved for review. See Springfield v. Kibbe, 480 U.S. 257, 258-260 (1987); Cort v. Ash, 422 U.S. 66, 73, n. 6 (1975). This Court is particularly wary of reaching an issue which the court below has not addressed. See Hudson v. McMillian, 112 S.Ct. 995, 1002 (1992); U.S. v. Frady, 456 U.S. 152, 158, n. 7 (1982).

In this case, the warden has not preserved for this Court's review the question she presents in her petition for certiorari and, as a consequence, the court below, the Tenth Circuit, has not addressed the merits of the question. The warden asks this Court to decide what standards govern the exercise of a federal judge's power to permanently discharge a successful habeas petitioner. (Pet. i). As the Tenth Circuit ruled, Burton II, 975 F.2d at 694, the warden has waived any challenge to the federal district court's imposition of a retrial bar in this case. Thus, the warden has failed to preserve the question for

which she seeks certiorari review.

The Tenth Circuit held that the issue was not preserved because the warden had neglected to raise on her first appeal the issue of the remedy attached to the district court's granting of the writ. Id. at 693-694. This holding follows the well established principle espoused by every federal circuit court of appeal considering the issue that an argument which could have been raised on an initial appeal, may not be considered on a second appeal following a remand. See, e.g., Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 505 (4th Cir. 1992); McKnight v. General Motors Corp., 973 F.2d 1366, 1373 (7th Cir. 1992); Stinson v. Kaiser Gypsum Co., Inc., 972 F.2d 59, 61, n. 3 (3rd Cir. 1992); Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1106 (9th Cir. 1988); Lupo v. Rowland and Co., 857 F.2d 482, 484 (8th Cir. 1988); Laffey v. Northwest Airlines, Inc., 740 F.2d 1071, 1089-1090 (D.C.Cir. 1984); Crick v. Smith, 729 F.2d 1038, 1040 (6th Cir. 1984); Raxton Corp. v. Anania Associates, Inc., 668 F.2d 622, 624 (1st Cir. 1982). See 18 Charles A. Wright et al., Federal Practice and Procedure §4478 (1981).

As a result of its holding in this regard, the Tenth Circuit refused to address the issue of when permanent discharge was appropriate as a remedy upon the granting of a habeas corpus petition, i.e., the issue presented in the warden's certiorari petition. Burton II, 975 F.2d at 693-694. Instead, the Tenth Circuit remanded the case to the district court to carry out its

original intent with respect to barring retrial as the sanction for a failure to retry Ms. Burton by the court's deadline. Id. at 694. Since the warden has failed to preserve the question she presents in her petition and the Tenth Circuit did not address that question because of the preservation failure, it would be inappropriate to grant certiorari in this case. See Boeing Co. v. Van Gemnert, 444 U.S. 472, 480, n. 5 (1980)(refusal to consider an issue which was not raised on an initial appeal); Marsh v. Chambers, 463 U.S. 783, 793, n. 15 (1983)(refusal to review unappealed issue); Springfield, 480 U.S. at 259 (refusal to consider unpreserved issue); Cort, 422 U.S. at 73, n. 6 (similar); Hudson, 112 S.Ct. at 1002 (refusal to consider issue not addressed by the circuit court of appeals).

The warden predicts dire consequences if the Tenth Circuit's decision in this case is allowed to stand; she claims that the decision allows federal district courts to bar retrial for successful habeas applicants for any reason in any case. (Pet. 9, 10, 11, 12, 14, 15). Since the Tenth Circuit never even reached the question of the limits on the district court's power to permanently discharge a habeas petitioner, this is obviously a bogus argument.

Moreover, what the Tenth Circuit did say in this case on the standards governing the preclusion of retrial conforms with what the warden proposes and what other circuit courts of appeal have pronounced on the matter. The Tenth Circuit stated that, given its substantial power under 28 U.S.C. §2243, a federal district

court has the authority to permanently discharge a successful petitioner in a habeas corpus case. Burton II, 975 F.2d at 693. The warden apparently agrees with this proposition. (Pet. 12, 16-19)(citing with apparent approval cases that granted permanent discharge). The Tenth Circuit also stated that, in exercising its broad authority, "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted." Id. The court then noted that holding a conviction invalid and granting a habeas writ do not generally bar retrial on the original charge, citing a case, Bromley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977), in which the Tenth Circuit invalidated a permanent discharge. Burton II, 975 F.2d at 693. Thus, the Tenth Circuit in this case recognized the very point the warden makes in her petition, that district courts do not have unlimited discretion to provide a retrial bar as a remedy when granting a writ. Indeed, the Tenth Circuit indicated the district courts' discretion in that regard is considerably limited. The Tenth Circuit's remarks are very much in line with the holdings in all the cases from other circuit courts of appeal cited by the warden. (Pet. 16-18). The Tenth Circuit's decision does not give the district courts carte blanche, as the warden contends. The state, however, deprived the Tenth Circuit of the opportunity to substantively review the exercise of the permanent discharge discretion by the district court in this case by failing to raise the issue of the court's remedy during the first appeal.

The warden complains that the state was never given a real opportunity to correct the constitutional error in Ms. Burton's first trial by holding a second trial. (Pet. 10, 11, 12, 13). In fact, the state could have taken any of a number of alternative courses of action to preserve that opportunity, even aside from the obvious course of retrying Ms. Burton within the 90-day time period established by the district court. The warden could have sought clarification or modification of the district court's order, if it was confused or unhappy about the nature of the remedy provided for by the order. See Grasso v. Norton, 520 F.2d 27, 37-38 (2nd Cir. 1975). The warden could have sought an extension of the deadline. The warden could have appealed the district court's denial of its stay motion, in which the warden acknowledged that Ms. Burton's retrial would be permanently barred absent a stay. The warden could have sought a stay in the Tenth Circuit, pursuant to Fed.R.App.P. 8. The warden could have raised the retrial bar issue in her first appeal. The state took none of these simple options to preserve its chance to retry Ms. Burton. It is not unfair, then, for the state at this late date to be given no further chances. See In re Public Service Co. of New Hampshire, 963 F.2d 469, 472-473, 476 & n. 9 (1st Cir. 1992) (appeal of a bankruptcy court order confirming a reorganization was mooted when the appellant failed timely to seek a stay of the reorganization order).

The warden extols the value of federal-state comity and claims the Tenth Circuit's decision in this case undermines that

principle. (Pet. 11). In fact, the decision upholds that doctrine. In McClesky v. Zant, 111 S.Ct. 1454, 1469 (1991), cited by the warden, (Pet. 11), this Court proclaimed that the federal writ of habeas corpus overrode any considerations for the finality of state convictions "when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." That is precisely what happened in this case. Ms. Burton raised a meritorious constitutional claim in a proper manner. She is entitled to federal habeas corpus relief.

On the other hand, the state in this case attempted to defy the federal courts' interest in finality. The federal interest in finality is as great as the states'. Frady, 456 U.S. at 169, n. 17. By raising the remedy issue on a second appeal after a remand the state was attempting to undermine the federal interest in finality and in resolving all the issues in a case at the earliest possible point in the proceedings. See Omni Outdoor Advertising, Inc., 974 F.2d at 505. The Tenth Circuit's decision precluding the warden from raising the retrial bar issue upheld that interest in this case.

In Coleman v. Thompson, 111 S.Ct. 2546 (1991), cited by the warden, (Pet. 11), this Court ruled that a habeas petitioner forfeited his right to present in the federal courts his federal constitutional claims challenging his death sentence because his attorney had filed a notice of appeal late in the state courts. Likewise, in this case, the state has forfeited its opportunity to retry Ms. Burton because it failed timely and properly to take

any of the procedural steps it could have taken to preserve that opportunity. It is now too late for the state to complain of the district court's retrial bar remedy.

The determinative matter in this case, then, is the effect of the procedural default by the warden. This is an issue not raised in the question presented by the warden in her certiorari petition. Consequently, that issue is not reviewable by this Court. See Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 551-552, n. 3 (1990); Sup.Ct.R. 14.1(a)("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court).

Moreover, the real issue in this case is peculiarly fact-bound. Resolution of the issue depends on an analysis of the particular language of the district court's order and the specific conduct of the parties and the courts involved. Furthermore, the Tenth Circuit's determination of the issue was well within the mainstream of federal circuit case law. The issue raises no dispute among the circuit courts of appeal.

A petition for certiorari will be granted only for "special and important reasons." Rice v. Sioux City Cemetery, 349 U.S. 70, 73, 74 (1955); Sup.Ct.R. 10.1. "Special and important reasons" mean issues "beyond the academic or the episodic." Rice, 349 U.S. at 74. It is very important that certiorari not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and where there is a real and embarrassing

conflict of opinion and authority between the circuit courts of appeal." Id. at 79, quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). The noncontroversial, procedural issue presented by this case, but not noted by the warden's certiorari petition, fails to qualify under this stringent standard.

This Court should not devote its scarce resources to this case. As the Tenth Circuit has held, the warden petitioner has failed to preserve the question for which she seeks review. The Tenth Circuit's opinion does not conflict with any decision by any other circuit court, and the warden points to no such decision. The determinative procedural issue was not listed by the warden as a question for which she sought review. The real issue in this case presents no important controversy and is inextricably tied to the rather complex facts of this peculiar case. This case is clearly not worthy of certiorari review. See Duncan v. Tennessee, 405 U.S. 127, 127 (1972).

## CONCLUSION

For the reasons set forth above, respondent Shirley Burton requests that this Court deny warden Johnson's petition for certiorari.

Respectfully submitted,

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Attorney for Respondent

NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

CERTIFICATE OF SERVICE

I, Tova Indritz, declare under penalty of perjury that I am a member of the bar of this court and as counsel for Shirley Burton, Respondent, that I personally mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari by first class mail, postage prepaid to Mary Catherine McCulloch, Assistant New Mexico Attorney General, P.O. Drawer 1508, Santa Fe, NM 87504-1508, this 23rd day of March, 1993.

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March 23, 1993

Mr. William K. Suter, Clerk
United States Supreme Court
Washington, DC 20544

Re: Sharon Johnson v. Shirley Burton
No. 92-1412

Dear Mr. Suter:

Enclosed are original and nine copies of Brief in Opposition to Petition for Writ of Certiorari in the above-referenced case.

Sincerely,

Tova Indritz

Tova Indritz
Federal Public Defender

TI:mga

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